97-84218-1

U.S. Congress. House.

High cost of living as affected by trust...

Washington

1919

BIBLIOGRAPHIC IRREGULARITIES

MAIN ENTRY: U.S. Congress. House.

High cost of living as affected by trust and monoplies

Bibliographic Irregularities in the Original Document:

List all volumes and pages affected; include name of institution if filming borrowed text.

_____Page(s) missing/not available:_____

_____Volume(s) missing/not available:_____

_____Illegible and/or damaged page(s):_____

_____

_____Page(s) or volume(s) misnumbered:_____

_____Bound out of sequence:_____

X
_____Page(s) or volume(s) filmed from copy borrowed from: Stanford University
(cover - p. 5)

_____

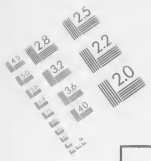
_____Other:_____

_____

_____Inserted material:_____

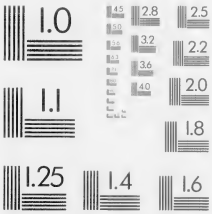
TRACKING#: MSH28956

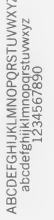
PM-MGP
METRIC GENERAL PURPOSE TARGET
PHOTOGRAPHIC




150 mm

100 mm





1.0 mm

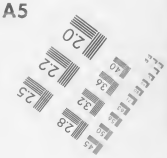
1.5 mm

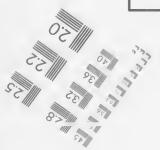
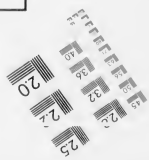
2.0 mm

2.5 mm

A5

A4



PRECISION℠ RESOLUTION TARGETS

A&P International
2715 Upper Afton Road, St. Paul, MN 55119-4760
612/738-9329 FAX 612/738-1496

HIGH COST OF LIVING AS AFFECTED BY TRUST AND MONOPOLIES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-SIXTH CONGRESS

FIRST SESSION

STATEMENTS OF FEDERAL TRADE COMMISSIONERS

VICTOR MURDOCK
WILLIAM B. COLVER
HUSTON THOMPSON

Serial 5

SEPTEMBER 8-9, 1919

WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-SIXTH CONGRESS.

ANDREW J. VOLSTEAD, Minnesota, *Chairman.*

DICK T. MORGAN, Oklahoma.
GEORGE S. GRAHAM, Pennsylvania.
LEONIDAS C. DYER, Missouri.
JOSEPH WALSH, Massachusetts.
C. FRANK REAVIS, Nebraska.
JAMES W. HUSTED, New York.
GILBERT A. CURRIE, Michigan.
DAVID G. CLASSON, Wisconsin.
WILLIAM D. BOIES, Iowa.
CHARLES A. CHRISTOPHERSON, South Dakota.
RICHARD YATES, Illinois.
WELLS W. GOODYKOONTZ, West Virginia.
EDWIN Y. WEBB, North Carolina.
ROBERT Y. THOMAS, JR., Kentucky.
WILLIAM L. IGOE, Missouri.
WARREN GARD, Ohio.
RICHARD S. WHALEY, South Carolina.
THADDEUS H. CARAWAY, Arkansas.
M. M. NEELY, West Virginia.

W. C. FREUS, *Clerk.*

HIGH COST OF LIVING AS AFFECTED BY TRUSTS AND MONOPOLIES.

SERIAL 5.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Monday, September 8, 1919.

The committee this day met, Hon. Andrew J. Volstead (chairman) presiding.

Other members present were: Mr. Dyer, Mr. Boies, Mr. Yates, Mr. Goodykoontz, Mr. Igoe, Mr. Gard, Mr. Whaley, and Mr. Steele.

The CHAIRMAN. The committee will come to order. Mr. Commissioner Murdock, the committee would be pleased to hear you.

STATEMENT OF HON. VICTOR MURDOCK, COMMISSIONER FEDERAL TRADE COMMISSION.

Mr. MURDOCK. Mr. Chairman and gentlemen of the committee, I take it that this hearing has its inspiration in the address of the President to the Congress, dealing with the high cost of living. The Government departments are at this moment directing their attention to that problem, and if I may, I would like in the beginning, to give somewhat of a personal view of the way the problem appears to me. First of all, there is disorder in the world due to the war, which disorder has many expressions, among them extravagance, waste, and lack of production.

The CHAIRMAN. And too much money?

Mr. MURDOCK. I will come to that. Growing out of the war a second general cause has arisen, inflation of the currencies of the world, varying in degree in different countries, and expansion of credit. More particularly in the United States a third cause has arisen, not a sole cause, and its relations to the other causes are not as yet exactly determined. This third element is heavy exportation. A fourth cause is heavy taxation. A fifth cause is speculation. A sixth is

found in restraints of trade. Of these we have a very intimate view in the Federal Trade Commission. There are other causes, and among them are some undetermined factors, factors that no man completely comprehends. There are evolutions evident through the world which is impossible precisely to define or to offer concrete remedies for at this time.

Take, for example, the social change in labor in the world. There has been in the last 100 years a tremendous increase in the rate of production and volume of production through tool power and process. Machine-made goods are put out in a volume which was beyond the imagination of man 100 years ago. I think that labor, the world around, with more emphasis in Europe probably than in the United States, believes that there is not an equitable distribution of the production arising from tool power and process, and I think labor is going to demand more and more that it have a more equitable distribution of the joint product of the community.

Now, we touch in the Federal Trade Commission more particularly one element in these causes which I have recited, restraints of trade, and in approaching that subject I would like to say for the record and to the gentlemen of this committee that I am convinced that not only is there working in the world a profound change incident to production, but there is working also throughout the world an epochal change in commercial methods. The international politics of the future, the international trade and industry of the future, and the factor of overseas transportation are all going to be marked in the future by the presence and activities of exceedingly great units. Much business is now done by big units. It will continue more and more to be done by big units. The chief activities will center in basic commodities. I think that it is going to take all the forebearance, all the patience, all the devices of solemn compacts between nations in the next 20 years to keep society at peace because of this. Take the matter of petroleum alone. Within 10 or 15 years the bulk of the overseas traffic of the shipping nations will have as power fuel oil. There are two great companies in the world at the present time, two great units, not perhaps units legally, but units in action. One is our own great company, the Standard Oil Co., and the other is the Dutch-Shell Combination of Great Britain. Those two companies are the greatest companies in petroleum in the world. Not only the navies of all countries but the merchant marine of the world as well, in the next 10 years are to become more and more dependent upon petroleum. Both these ambitious companies are out in the world's markets for business. Both are placing throughout the seven seas great reservoirs for the fueling of ships. They are strongly competitive. They are also strongly nationalistic.

I want to say to you gentlemen with as much solemnity as I can summon that we may see Great Britain and the United States embroiled over this rivalry in the next 20 years, unless, as I said previously, the peoples of both countries exercise forbearance and patience, and unless there is an increasing supervision over commerce by these two Governments—Great Britain and the United States.

We have in the United States, in the way of supervision over large units, first the Sherman antitrust law of 1890. That was later supplemented by the creation of the Federal Trade Commission, which was given power to keep alive the principle of competition in commerce. In addition, Congress gave the commission power over four sections

of a supplemental antitrust law—the Clayton Act. The activities of the Federal Trade Commission are centered, in fact, in six sections of the two laws—two sections of the Federal Trade Commission law and four sections of the Clayton Act.

The CHAIRMAN. The Federal Trade Commission act only authorizes investigations by the Federal Trade Commission, and the hearing of complaints for unfair methods of competition.

Mr. MURDOCK. That is correct.

The CHAIRMAN. And it is also given jurisdiction under four sections of the Clayton Act.

Mr. MURDOCK. I would like, if I may this morning, to confine myself to suggested amendments of those two acts, briefly as possible, and then Mr. Commissioner Colver and Mr. Commissioner Thompson will follow with suggestions, which will be quite independent of mine, some of them, and some undoubtedly in emphasis of what I have said.

The section of the Federal Trade Commission act which is followed with the most activity and helpfully constructive work by the Federal Trade Commission is section 5. You remember that the burden of section 5 reads substantially as follows: That unfair methods of competition in commerce are hereby declared unlawful, and whenever the commission shall have reason to believe that an unfair method of competition in commerce has been or is being used it shall (because the law is mandatory) issue a complaint. After the complaint has been issued, under the direction of the law, a hearing is given the parties complained against, and thereafter the commission, if its reason to believe is confirmed, may then issue an order upon the respondent to cease and desist. An appeal from that order lies to the circuit court of appeals.

I think that it would be well if I would detail to the committee just what the proceeding under that section is. Anyone in the United States may write in to the commission, and they do by the score, complaining that such and such an act is an unfair method of competition, and asking relief. The commission takes this letter, usually a business letter, places it in the hands of the chief examiner who has all this preliminary activity in charge, and the letter is docketed as an application for the issuance of a complaint. It has not reached the formal complaint stage yet, and to the fact that it has not reached the complaint stage is due a great deal of misunderstanding in the public mind and considerable unjust criticism of the commission. When we receive a complaint it does not at once become a formal complaint; it becomes an application for complaint. The chief examiner takes this application for complaint, places it in the hands of an examiner, usually an attorney, and this examiner, either through correspondence or by personal visit, develops the facts in that case, usually sees both parties, finds out what is back of the complaint, and whether it be justly founded or not.

Mr. DYER. May I interrupt just for a minute?

Mr. MURDOCK. Surely.

Mr. DYER. You say the attorney or employee visits both the complainant, the one who writes the letter, and the one who is complained against?

Mr. MURDOCK. Yes; he may.

Mr. DYER. My understanding has been that they did not, and that is why I wanted to ask the question. My understanding has been that the one who is complained against is kept in ignorance of

it throughout the entire procedure, and is not even made acquainted with the fact that some one has complained against him.

Mr. MURDOCK. Mr. Dyer, from all the cases that I have handled I think I can say, without exception, that the attorney does visit the man who later becomes the respondent.

Mr. DYER. I know I made a request of an attorney some time ago to find out who it was that was complaining against a constituent of mine, and he refused to tell me.

Mr. MURDOCK. That is true, and I can answer your question about that. Very frequently the commission will not reveal the name of the complainant to the respondent to be. It does not reveal the name of the man who brings the complaint, because the applicant for formal complaint is carried in the docket as the Federal Trade Commission; that is, as the applicant for the issuance of a complaint against the party complained of. The commission takes the place immediately in the title of the procedure of the man who has made the complaint, and very frequently we do not reveal the name of the complainant. Very often he requests that we do not, and there are other reasons for that.

Now, after the attorney has examined the case, his report comes back to the chief examiner. If the chief examiner is not convinced that it has been thoroughly investigated and inquired into there is a further inquiry, and all these steps, Mr. Dyer, are taken with the idea of avoiding working an injury, and not going off half-cocked in the case. After the inquiry by the examiner has been completed the application for complaint passes into the hands of a board of review; made up of the staff of the commission, of economists and lawyers. They read the findings of the examiner and make a recommendation to the commission, the recommendation being in the one instance that complaint issue, or in the other that the application be dismissed. The application then comes to a commissioner to whom it has been originally assigned for supervision, the commissioner reads the case, the report of the board of review, and then writes a recommendation to the commission. He may disagree with the board of review, and if the commissioner does disagree with the board of review, then the board of review is invited in before the full commission to argue their side of the case as against the commissioner. If a majority of the commission agrees with the board of review, and the board of review has recommended the issuance of a complaint or a dismissal, then the commission orders the issuance of a complaint or dismissal.

Now, up to this point there has been no formal complaint. This has been only the application for complaint. The commission has been arriving at a reason to believe or not to believe that an unfair method of competition has been or is being used. Having arrived at a reason to believe, then, and then only, does the commission issue its complaint. That makes for a very safe and sure survey. It is very difficult for injustice to be done anyone when that degree of care is exercised.

Now, then the complaint is ordered issued, the matter passes out of the hands of the chief examiner and the board of review and passes into the hands of a chief counsel, the head of the legal branch of the commission, and the chief counsel proceeds to draft the complaint and the commission serves notice upon the parties in interest.

Mr. STEELE. When the board of review presents its report, is that report passed upon by the entire commission?

Mr. MURDOCK. Yes.

Mr. STEELE. That is the report of the board of review before the issuance of a complaint is authorized?

Mr. MURDOCK. Well, Mr. Steele, the commissioner to whom the case has been assigned in the first place first reads the report of the board of review, and agrees or disagrees with the board of review, and then the case is taken before the full commission. If the commissioner disagrees with the board of review then, under the rules, the board of review must come before the commission to argue its side of the case, and as very frequently happens a commissioner is reversed by the commission, the rest of the commission agreeing with the board of review.

Mr. STEELE. Then in reaching a judgment your system is practically that of an appellate court?

Mr. MURDOCK. I am not acquainted with that court procedure, so I can not answer that question. Now, when a complaint is issued, notice is given and hearing is held. Of course, the complaint is issued in written form, and parties have the right to file a written answer, and I think invariably do. Finally, the case, after hearing, is argued out on briefs and orally before the commission, if parties desire, and if the commission's reason to believe is confirmed on trial of the law and facts, then the commission issues its order to cease and desist.

It is a noteworthy thing, and it is a gratifying thing about this procedure that at many stages along the line of procedure the respondent wants to confess his fault and quit. Many, many of these cases reveal at once methods that are obviously unfair; the very complaint itself establishes that the method is unfair—the method complained against. A criticism has arisen against the commission, due to that fact—and I do not want to take too much time with that, but I want to get to the Committee on Judiciary just what that criticism is. It is a criticism to the effect that the commission issues the complaint and does not dismiss the application for complaint when complaint is indicated. A man files an application for complaint with the commission; the commission investigates the application; it goes to the respondent to be, the prospective respondent; the prospective respondent takes a look at his act and says, "Of course, that was wrong, and I would like to quit."

Mr. STEELE. Is not the criticism largely this, Mr. Murdock, that the commission, instead of looking at things in a judicial way, becomes a prosecutor?

Mr. MURDOCK. I will let some one else handle that. I resent that. As a matter of fact, our procedure prevents our being the prosecutor. We must be the impartial judge, our survey of the facts being so long and thorough.

Mr. WHALEY. But do you not bring the proceeding and try your own case?

Mr. MURDOCK. Yes; we issue the complaint on reason to believe, and we finally pass judgment on all the facts in the case, after argument at the end, before we issue an order to cease or desist, or refuse to issue it.

Mr. WHALEY. Do you not find him guilty when you bring the complaint and try the case?

Mr. MURDOCK. Absolutely not.

Mr. IGOE. But after all, you find him guilty.

Mr. MURDOCK. Certainly, if we issue the order. It is that very idea in the minds of men, that we do find them guilty when we merely issue a complaint that makes many resent the complaint. Now I submit this thought to the Judiciary Committee. I am not in favor of a government by men. While I am not a lawyer, but a newspaper man, I am very much in favor of a government by law. Section 5 leaves me, as a commissioner, no discretion in the matter of a complaint. After I have investigated, as a commissioner, an application for complaint, and I have reason to believe that an unfair method of competition in commerce has been used or is being used, and the commission agrees with me, then the law says specifically that we shall issue that complaint. Now, that is not a sentence of guilt, it is not a finding of guilt against the respondent; it is merely the issuance of the complaint, setting in progress an inquiry to develop facts and law. If the law said that we might issue a complaint after reason to believe, or we could if we wished, issue a complaint, then I could see that before the day of the issuance of the complaint the commission might legally dismiss a case where the facts indicated a complaint, but where the law says manditorily that we shall issue this complaint where complaint is indicated, I do not see any escape from that, and I do not see that there should be any escape. For this reason, that when we have reason to believe that a method of competition is unfair and we issue the complaint and try it out, in the trial we serve notice to all the community that this practice has been challenged and is being tried. If, before the day of the issuance of the complaint, the application is dismissed, it is done in obscurity, and the community in general has no benefit from the trial.

Now, what are some of these complaints? Well, some methods complained of are obviously unfair, so obviously unfair that you would think at first that no investigation or inquiry was necessary. Some of them run through entire trades. I handled recently a portion of the sponge trade of the country. Sponges are fished out of the ocean somewhere off the coast of Florida. For the last 15 or 20 years, perhaps longer, sponges in volume have been sold in bales, by weight. Some of the bills of sale on a bale of sponges read very curiously, that the sponges can not be returned to the consignor if the bale is broken, or if the bale becomes wet. A dealer in sponges complained that some in the sponge trade were loading these sponges with salts, glucose, and other weighty materials. Obviously, if the bale was broken, the salt being dry would fall out and the weight of the sponge would diminish, or any other loading would drop out. Now, when that application was made I had reason to believe that this was an unfair method of competition. I think anyone would. We put out an examiner who went to the members of the trade, and I think that they are now unanimous in asking that the commission forbid this practice.

Mr. BOISE. Do you not think that was proper, rather than——

Mr. MURDOCK. Certainly, but in many of these cases that come to the commission the element of fraud is present, not always as manifest as in the case I have just cited, but it is there. Now, we took these cases, these applications, and they reached into many sections of the United States, and we have issued our complaints. The men against whom the complaints are issued, without any question or objection, will come to the commission and consent that an order be issued against them to cease and desist this practice. I do not believe they will want a trial of the case. As a matter of fact, I think a great majority of the men if not all in the sponge trade are glad to get rid of the practice.

As you know, we have gone into commercial bribery, the paying of commissions to employees of customers by the manufacturer, jobber, or dealer.

Mr. COLVER. Secret commissions?

Mr. MURDOCK. They are, of course, secret commissions. Some of those cases are very clear. When a complaint issues, the respondent comes in immediately and says, "I consent to an order to cease that; let us get the practice out of the way."

Mr. STEELE. At that point, Mr. Murdock, the mere issuance of a complaint sometimes acts as a stigma upon the business, and I wondered whether or not any opportunity was given the respondent to present his side of the case before complaint actually issues.

Mr. MURDOCK. Not before the commission.

Mr. STEELE. Or before any officer of the commission.

Mr. MURDOCK. Very frequently the examiner calls upon the prospective respondent. In the sponge case we went to all the respondents, all the dealers in sponges, and asked them what about it, and they said it was a vicious custom that had grown up in the trade, and they were glad to be ordered to quit it.

Now, similarly men come to the commission and consent to an order to cease and desist in commercial bribery cases, if the case is flat-footed and plain. But there are some cases that are very, very difficult. There is a twilight zone between what is a substantial bribe and what is a harmless gift. If we should issue a complaint against a man for giving a cigar secretly to the employee of a customer to get his trade, of course that would be absurd; two cigars, three cigars absurd, possibly a box; the gift of a bottle of whisky to secure trade in a wetter day than this might have been absurd. But there comes a time when you cross the twilight zone, and you get into a region where the secret commission is clearly bribery. The practice then is not trivial. In some instances it is very extensive. In some cases the money which it is alleged has secretly passed reaches very large sums. We have one case still on trial before the commission in which the allegation appears that one manufacturer in three years gave in commercial bribes secretly to the employees of his customers over a million dollars.

We have inquired into this practice in many trades; we have been into printer's ink, and, by the way, the manufacturer of ink came to us and asked us to go into it; we have been into commercial bribery in varnish, in soap, and we are now inquiring into the practice in dyestuffs.

During the war, Mr. Herbert Hoover, as you know, had very broad power given to him by Congress. One day Mr. Hoover came to the commission and said he had one proposition that he could not handle very well. It was this, that the canners of vegetables, in delivering on their contracts with jobbers and wholesale grocers and others, were in some instances withholding the contract quota and selling spot on a rising market; that that was unfair and that he thought we could handle it. Now, at first blush it does look to be an unfair method of competition, but when you come to prove it legally as an unfair

method of competition, it is quite difficult. As you gentlemen know, vegetables for canning are contracted for in the trade before the seed has gone into the ground. The date, I think, used to be May 1, but they have now moved it back to January 1 when the goods are sold. That is before the field has been plowed, before the seed has gone into the ground. The canner of fruits and vegetables proposes to the purchaser thereof that he will sell him these goods at a certain price; that in the case of a crop shortage, that his pack, less a certain per cent, will be distributed pro rata among the purchasers. Now, in the case which Mr. Hoover was struggling with there had been a crop shortage, but numerous canners were not distributing their pack pro rata, but were withholding a portion of the pack and selling on the market spot, on the speculative market. That was during the war and the market was going up very rapidly.

In my innocence, and I was new on the commission then, I spoke right up and said, "I can handle that case. There may be an unfair method of competition in it." So Mr. Hoover gave me several cases, and I went to work at this proposition. I soon found myself in pretty deep water. The packer of the vegetables and the wholesaler, who was his customer, might not be, in the strictest legal parlance, competitors. A canner might compete with a canner, a wholesaler or jobber might compete with a wholesaler or jobber, but here was a situation between the canner and the wholesaler. The country was at war. Prices were going up. Trade was disordered. I went ahead as best I could with my case, but I realized for the first time that section 5, as Congress had given it to us, did not completely reach some very important trade practices which were unfair. It is beside the mark here to say that in this instance, the instance of the canned goods, by reason of the fact that I, as commissioner, was powerless to bring a quick and needed remedy to the situation, I adopted the device of notifying Mr. Hoover that such and such a man should not have done what he did do in speculatively selling spot on the market, and breaking his contracts. Mr. Hoover, on my recommendation, in a few cases revoked the offender's license after I had fully heard the case. Mr. Chairman, the result was instant and far-reaching. It only took four or five revocations of licenses to bring the speculative spot sellers and abrogators of contracts to their senses.

A group of men from Illinois came in to me the other day and asked if the commission could do something on the subject of split commissions. We are attempting it, but I do not know how far we will get. What is a split commission? A broker in a given trade will split his commission with the purchaser of goods. I have looked the law through carefully, and it is very difficult to say whether this law which Congress has given us will reach that practice. The manufacturer who sells through the broker, or who sells to the jobber, is not a competitor of the broker or jobber. The split commission, therefore, does not seem to be a method of competition. Yet it disorders trade. I think you would find that 99 per cent of the wholesalers in the country would say to you that it is a bad practice. During the war Mr. Hoover stopped it, to the benefit of society, but since Mr. Hoover has taken his hands off the control, split commissions have come into trade again.

Here is another device, a device that seems to be coming into general use. It has been used apparently for many years sporadically

in industries. It is the device known as the guarantee against decline. Take the soap business. The manufacturer of soap sells his wares to the jobber of soap. That soap goes on the shelves of the jobber, and the title in the soap passes; the soap is no longer the property of the manufacturer; it is the property of the jobber. The manufacturer contracts with the jobber that if the price of the soap declines he, the manufacturer, will save the jobber whole, he will make good to the jobber. That is, the jobber plays a cinch game. If the market goes up he wins; if the market goes down, he does not lose.

One of the oldest manufacturers of soap in this country, believing that this was not a good business practice, made up his mind that he would get out of it; but getting out of it is a very difficult matter, because if you do not guarantee against decline and your competitor does, you will get no soap orders. So the manufacturer in question proposed to the jobbers that he would guarantee against decline only on goods sold by them; that he would not guarantee against decline on invoice of goods on shelves. That is, the manufacturer wanted the transaction in the trade to go ahead and wanted the jobber to sell. If the jobber lost money he would save him whole; if the goods were merely there on the shelf he would not pay the difference between selling price and market price on those until they were actually sold.

The CHAIRMAN. You mean he would make an allowance on goods shipped from the factory?

Mr. MURDOCK. He would only pay, Mr. Chairman, on the goods the guaranty against decline after the jobber's sale; he would pay them the difference between his selling price and the market price.

Mr. BOIES. What the jobber had actually sold?

Mr. MURDOCK. What the jobber had actually sold, because this manufacturer says that the guaranty against decline on goods in stock tended to make the jobber not so much a merchandiser as a horder of goods, for on a rising market what was the jobber's incentive to sell if he could get a guaranty against decline on goods on shelf? It also developed in one case—this was not general, and I only mention it as showing to what extreme this sort of thing can be carried—that the jobber had recalled his goods from the retailer in order to make a good showing on his invoice at the set date for taking the invoice for determining the payment on the guaranty against decline.

Now, Mr. Chairman, we are going ahead with these cases under section 5, but I have been wondering—I do not think some of the other commissioners have to the same degree—if the words "unfair method of competition" so confine our activities that this guaranty against decline may not be an offense in competition, because in this instance the manufacturer and the jobber and the retailer are on different planes, and the jobber, while a competitor of the jobber, may not be in law a competitor of the manufacturer.

Therefore I want to make a suggestion to the committee about amending section 5. Before I make the suggestion I desire to go on record as saying that, quite apart from any relation that I have now to the Government or to my present activities, I think that Congress gave the Federal Trade Commission a very excellent, workable law. For many, many years, as a Congressman, I looked with disfavor on the continual application to Congress of the administrative branches of the Government for new law. I often felt that

many of the administrative bureaus did not fully develop the law that they had, but were too eager to come again to Congress and ask more and more power. Now, I am not here this morning asking for more power. We have power in the Federal Trade Commission. We are diligent and we are industrious. Our docket has reached something like 1,400 applications for the issuance of complaints. We do not want more power, but I would like to see certain sections of this law, if Congress in its wisdom sees fit, rounded out and perhaps strengthened, and in that rounding out process I would like to see section 5 changed.

The language of existing law is in part this:

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful. The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the act to regulate commerce, from using unfair methods of competition in commerce. Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least 30 days after the service of said complaint.

Mr. BOIES. Do you feel that that would cover the case of future sales on the stock market?

Mr. MURDOCK. I think the amendment I am to ask would reach it. I doubt very much whether this section would reach it. In that connection, when he is heard, I wish you would ask Mr. Commissioner Thompson in regard to his experience with the blue-sky cases; that is, the issuance of fake stock. The suggested amendment to section 5, I think, might reach just the thing you have in mind. I think that this amendment would reach the blue-sky proposition, the guaranty against decline, selling spot on the market, and breaking contracts, which is not only an individual matter but may become at times quite general, and other unfair acts.

Here is the amendment I propose to section 5:

"That unfair methods of competition, or unfair acts in commerce or affecting commerce, are hereby declared unlawful," with the subsequent changes in section 5 to harmonize it with that proposition.

The CHAIRMAN. Unfair acts? What was the other?

Mr. MURDOCK. "Unfair acts in commerce, or affecting commerce." Mr. Thompson, I want to get along, and I am going to ask you to handle before the committee the proposition of making an order of the commission effectual upon issuance. Under existing law the order can be ignored and does not go into effect if the parties to it ignore it. Of course, the commission has its remedy in an appeal to the circuit court of appeals, but the fact that our order, when issued, can be ignored puts upon the commission the job it should not have, that of policing its own orders.

Mr. IGOE. Has not the difficulty developed, Mr. Murdock, in these cases, under the definition of unfair methods of competition, to determine whether the act itself is one which affects competition? I am trying to get the reason for the use of the words "unfair act." It is pretty broad.

Mr. MURDOCK. It is pretty broad.

Mr. IGOE. It would be an act which affects competition. Would you go so far as to give the commission authority to regulate the whole method of doing business of a concern regardless of its effect upon competition?

Mr. MURDOCK. My answer to that is that I would go so far as to have the commission empowered with the right to reach into an unfair act where otherwise that offense against good business practice was not reachable, because it was not an act of one competitor against another competitor. If I may make myself more clear: In the stages of business from the manufacturer to the consumer, business is so interrelated that the manufacturer, the jobber, the wholesaler and the retailer are often all affected by a business practice. If an act is done at one level which affects unfairly business at another level, I would give the commission power to reach both levels and correct it. That is, if the wholesaler does something which is unfair to the retailer, the wholesaler is not, in strict legal parlance, a competitor of the retailer, and yet his act may be unfair to the retailer and is an unfair act in commerce. That is the idea in the proposed amendment.

Mr. IGOE. But somewhere back in the process you have people in the same class who are affected by this product used by a concern in another class.

Mr. MURDOCK. Where we can find that, then, of course, we can proceed, because then it is a method of competition.

Mr. STEELE. Have you in mind the case of a patent broker, where there is no competition?

Mr. MURDOCK. What?

Mr. STEELE. Manufacturing under a patent, where they have a legal monopoly?

Mr. MURDOCK. Such cases do not frequently arise. We have power over cases of patented articles where there is competition.

Mr. BOISE. You do not have jurisdiction over a man or corporation that is not doing an interstate business?

Mr. MURDOCK. No; we have not. In our investigation of the application for a complaint, our first step is to find whether it is in interstate commerce. If it is not in interstate commerce, we do not go on. Commerce is defined in the act as interstate commerce, and, of course, Congress could not constitutionally give us the power to go into intrastate commerce.

Section 6 of the Federal Trade Commission act reads, in part, as follows:

That the commission shall also have power—

(*a*) To gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(*b*) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

I would like to see those paragraphs changed to read:

Persons, partnerships, or corporations engaged in commerce,

That is, I would like to see the act extended over persons and partnerships in that respect, the right to gather and compile information and as otherwise provided in the paragraphs. It would be useful and I do not think it would work harm to anyone.

The same thing is true in paragraph (*g*) of the same section. I would like to see the law extended over persons and partnerships, as well as corporations.

Further, I think the Congress should give the commission another activity under section 6. In fact, I think that this activity, which I now propose, would be more useful than any other suggestion that can come to this committee from the Federal Trade Commission. The community is generally organized—all trades are in organizations; every branch of every trade and every industry is organized. A great many of these organizations are voluntary organizations. Men come in or go out, as they please. They come in; they very rarely go out. These associations are beneficial in a great many ways. Men in this day and age will get together. The retail dealers, the wholesale dealers, the manufacturers do have meetings; they do exchange views.

The CHAIRMAN. And they do fix prices?

Mr. MURDOCK. Yes; I was just coming to that. And after having come together and having exchanged views as to trade, then there are two other steps which they are very apt to take. The first step is a plan known as the open-price association. Is the committee familiar with that? I am not going into this if it is. The open-price association broadly adopts the device of a compilation of the selling price of goods by all the members of the association up to a given time limit; that is, Brown, Jones, Smith, and Simpson, all belonging to an association, bring together records of the prices at which they sold their wares up to this time limit. That is not fixing a future price.

The CHAIRMAN. But it does accomplish the same thing?

Mr. MURDOCK. It is accomplishing the same purpose. Of course, the next step is price fixing. From that they may pass over into fixing the price, agreeing on a future price.

The next step may be to pool their earnings, and it is possible for one unit of an aggregation of an association to be idle and yet to get annual earnings allowed it by the association. There are other processes which the association adopts after they have associated long enough. Are these unfair methods of competition? They are all in, the whole trade is in, and there is no competition. Is it an infraction of the Sherman Antitrust Act? Well, I will leave that for the Attorney General to answer. Every industry and trade is organized; many trades and industries in the United States are in voluntary associations, though not always, of course, to the degree which I have cited here. Should not those associations have over them governmental watchfulness? Ought we not to know just how far they are going?

Mr. STEELE. Was not that feature gone over in the United States Steel Co. case and the celebrated Gary interests?

Mr. MURDOCK. That is a manifestation of that same proposition.

Mr. YATES. Nobody was discriminated against except the public.

Mr. MURDOCK. Except the public; they are all in, and the public is not a competitor of the United States Steel Co. Now, under existing law, under paragraph (e) in section 6—

The commission shall have power upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

Mr. YATES. What section is that?

Mr. MURDOCK. Paragraph (e) of section 6. In the early history of the commission, prior to my membership thereon, many of these associations of which I am speaking filed their minutes and proceedings with the commission and some wanted the commission to rule in advance on their acts as lawful or otherwise. The Federal Trade Commission refused to rule in advance, and I think very wisely. I do not think that the Congress of the United States intended to empower the commission with that much discretion. I am sure that as a citizen of the United States I do not want my Government to settle questions through rulings in advance; I believe controversial questions should be investigated and tried out. I would not care to submit my case or my brother citizen's case to a group of governmental officials who could give final mandates without the right of review. But I think it would be very useful if Congress would empower the commission to look into these associations and combinations, inquire into them, into their practices, and if the commission believed, after full consideration and hearing, that an association was violating the antitrust acts, to issue an order against them to cease and desist, with an appeal both to the commission and to the party at interest to the circuit court of appeals.

Now that thought is embodied in an addition to section 6, which, Mr. Chairman, I desire to include in the hearings. Here is the proposed amendment:

Whenever from any investigation authorized to be conducted under this act the commission shall have reason to believe that any person, partnership, or corporation engaged in commerce has been or is in its organization, business, conduct, practices, or management violating the antitrust acts, or that the same will substantially lessen competition or tend to create a monopoly, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and shall proceed in reference thereto in all respects as provided in section 5 of this act.

If upon the hearing the commission shall be of the opinion that the method of organization, business, conduct, practices, or management is prohibited by the antitrust acts, or that the same shall substantially lessen competition or tend to create a monopoly, it shall make a report in writing in which it shall state its findings as to the facts and shall issue its order to cease and desist, or to readjust its organization, business, conduct, practices, or management as ordered.

The commission or any party made a part to the proceeding provided by this section may apply to the proper circuit court of appeals of the United States under the same terms and under the same conditions as is now provided in section 5 of this act.

The CHAIRMAN. Do you apply to the circuit court of appeals?

Mr. MURDOCK. To the circuit court of appeals.

Mr. STEELE. An appeal lies to that court now.

Mr. MURDOCK. An appeal lies there now. Now, Mr. Chairman, service upon the Federal Trade Commission brings one governmental problem squarely before one. Men are no longer acting in trade individually as they did once. There is some form of combination in every line. It may be a combination in restraint of trade, in

violation of the Sherman Antitrust Act; it may be purely a voluntary association where the associated members do not fix a price; it may be a species of cooperation which is beneficial to society. But the twilight zones between those concerts of action which are harmless and those which are not call for vigilance. In my opinion it would be of real benefit to the community, to the Nation, if the people had some one constantly on guard over those stages that run from cooperation, from voluntary association to combination; a trade policeman standing on guard to say, "At this point you have gone too far."

Mr. STEELE. Bearing on this proposed amendment, Mr. Murdock, suppose the offender conformed to the judgment of the Federal Trade Commission, do you provide that there shall be any further immunity from prosecution, if he does comply with the judgment of the Federal Trade Commission?

Mr. MURDOCK. No, there is no such provision.

Mr. STEELE. Well, he might comply with your judgment, and still the Attorney General might proceed against him.

Mr. MURDOCK. That is true; and I should say, Mr. Steele, that if our judgment was so faulty as to permit him to break the law, he should be proceeded against by the Attorney General.

Mr. IGOE. It would hardly seem fair, though, if he is brought in for a hearing and you prescribe a practice for him, and he proceeds along that theory, for some other branch of the Government to haul him up and say, "While you have followed out the directions prescribed by the Federal Trade Commission, still you have violated the law."

Mr. MURDOCK. Well, I still believe, however, that there should be always on guard, above the Federal Trade Commission, the chief law officer of the Government as to infractions of the law.

Mr. STEELE. The Government would still have the right of appeal to the Circuit Court of Appeals?

Mr. MURDOCK. Always.

Mr. STEELE. Would not that be his remedy, then, if he thought the fellow was disobeying your judgment?

Mr. MURDOCK. Yes.

Mr. IGOE. If the Federal Trade Commission, under the act, states that something is an unfair practice, then they have reached that stage where some one is eliminated from competition, and the only thing left is to prosecute the one who is eliminating his competitor.

Mr. MURDOCK. That is true, of course, to a limited extent, but that does not reach the voluntary association.

Mr. STEELE. Suppose you do reach them, and you pass judgment, that judgment ought to be worth something to the respondent, if he conforms to it?

Mr. MURDOCK. I should say it would be helpful to him.

Mr. STEELE. And if he does conform to it, it seems to me he ought to be exempt from any further prosecution, and the Attorney General ought to have the right of appeal, if he thinks the public ought to be entitled to any further protection.

Mr. IGOE. That is where you specify the practice or procedure which he must follow.

Mr. STEELE. Bearing on your statement that you made a while ago that you had on your docket now something like 1,400 cases——

Mr. MURDOCK. That is the total number of applications filed since the beginning of the commission.

Mr. YATES. Applications for complaints?

Mr. MURDOCK. Applications for complaint, not complaints.

Mr. STEELE. During the five years of the existence of the Federal Trade Commission it has passed, no doubt, a very large number of cases.

Mr. MURDOCK. About 350 actual complaints have been issued.

Mr. COLVER. That is not going to make a truthful record. You have dismissed a great many, too.

Mr. MURDOCK. I am speaking about their being about 1,400 applications for complaints docketed. There have been about 350 complaints issued, and a great many applications dismissed.

Mr. STEELE. I was just about to follow that up. That was only preliminary, Mr. Murdock. I was just about to follow that up by a question. I wanted to see whether or not, in general, the rulings of the Federal Trade Commission were followed, or what proportion of those cases were appealed to the Circuit Court of Appeals.

Mr. MURDOCK. About 5. As a matter of fact, Mr. Steele, the cases that come to us are so thoroughly gone into, and I think, upon the whole, the judgement is so fair, that the respondent does not appeal. I do not know whether the committee is aware of it or not, but Sears, Roebuck & Co. took the initial appeal from the commission's order.

Mr. STEELE. Is not the general disposition to accept the judgment of the commission as to what is fair or unfair?

Mr. MURDOCK. That is perfectly true. Sears, Roebuck & Co. of Chicago was complained against to the commission because they advertised in one of their catalogues that by reason of their large quantity purchases of sugar they were enabled to sell sugar cheaper than competitors. Well, of course, sugar buyers enjoy no advantage in quantity purchases. Everybody is supposed to buy sugar at the same price. We issued a complaint against Sears, Roebuck & Co., and they appealed against our order to cease and desist, and the court of Appeals upheld our contention. Very generally respondents against whom an order issues take the order by consent, because when the commission develops an unfair method of competition, in the majority of cases it is manifest to the offender himself that his practice was unfair.

Mr. IGOE. I take it that in the sponge case you spoke of that the trade wanted protection against themselves.

Mr. MURDOCK. Certainly. That very frequently happens. While I was in Congress I tried my best to get some sort of remedial law on misbranding textiles. I did not get very far. I got to the stage of introducing the bill and talking about it, with a hearing or two. Soon after I came on the commission a dealer in rope wrote in to the commission and said they were selling rope all over the United States called hardware manila, and it had no manila in it. That was an unfair proposition to the man who was selling manila rope. It so appeared to me. We went into the rope proposition. We found that many, but not all rope-makers by any means, were selling hardware manila. Hardware manila was sisal. It is not manila and has not the resisting qualities of manila, particularly as against salt water.

The CHAIRMAN. It has not the tensile strength either?

Mr. MURDOCK. No; it has not the same tensile strength. I talked to almost all the members of the trade. Most of them said, "Well,

we are glad this thing is to be stopped." I said, "Why did you ever get into it?" Some of them said, "Well, one or two fellows started it on a dare, and when they srarted it we had to go in to meet it, but it is not truthful; there is no manila in that rope; it is sisal." When we decided to clear up this practice, two manufacturers or rope said to me that it would cripple them to stop that practice, and I asked why. They said: "Because there is a price fluctuation in the content of rope, when one material will be up the other will be down, and we so manipulate the content that we can make money. If you put a brand on that rope, make mandatory a brand on that rope, you are going to deprive us of that leeway and cripple us."

I said that I did not believe that a square proposition in branding would cripple anybody. The rest of the trade were all strongly in favor of this change, several never having followed the practice, so we provided that where the maker used the brand "manila" on the burlap which covers the coil of rope, and there was only a percentage of manila in that rope, he should not use the word "manila" unless he showed the percentage of manila. One month after that unfair method was corrected I talked to the two men who were afraid it was goint to hurt them and they said it did not hurt them, that it was a good thing. It frequently happens that men are afraid to disturb any very old business practice, but if you use good, common, ordinary horse sense in making a ruling apply to a trade, you will find everybody is content and glad it is done.

The CHAIRMAN. I just wanted to make another suggestion. I notice that in some foreign countries they provide that a person selling shall not discriminate as between persons that want to purchase, practically putting them in the same position as common carriers. A common carrier can not discriminate, but must take and carry anybody's goods without reference to who he may be. Now, why should not these large concerns be compelled to sell to anybody, if they are a combination of practically the whole industry, why should we not adopt the practice that I understand prevails in some countries of compelling anybody to sell, provided he is offered the money for his goods?

Mr. MURDOCK. Mr. Chairman, the courts say that a man has the right to chose his own customer.

The CHAIRMAN. Yes. We said so in the Clayton Act. We no doubt can say that any of these very large concerns shall not be permitted to choose his own customer, provided he is offered the same price.

Mr. MURDOCK. This question of discrimination is perpetually before the commission; that is very pertinent.

The CHAIRMAN. We have this situation, for instance, in the coal and lumber trade. No man can start, for instance, in a small town to run a coal or lumber business without the consent of the wholesale industry, because he can not buy the goods. Now, I have no doubt that is true in a good many other lines. I want you to think that over, and see what your suggestion is.

Mr. MURDOCK. That will come into the discussion later very fully. Mr Colver and Mr. Thompson will both handle that proposition, and I think Mr. Porter.

The CHAIRMAN. The policy I suggest is in force in some countries, it is the same as the one we enforce against common carriers, and it

is a question whether these large concerns should not be compelled to sell indiscriminately to anybody that asked for their goods and offered to pay the price.

Mr. MURDOCK. I am glad you brought that up, because we are up against that problem in the Federal Trade Commission daily, and that brings us properly in order to section 2 of the Clayton act.

Mr. WHALEY. I understand that there are certain manufacturers of soap who sell to the retail trade with the understanding that the retail trade can not sell except for a certain price. Have you got jurisdiction over that?

Mr. MURDOCK. We have tried to have jurisdiction over that. We have taken jurisdiction on the civil side of it.

Mr. WHALEY. I understand that is universally the rule in Washington.

Mr. STEELE. Was not that declared illegal under the Miles case in New York?

Mr. MURDOCK. Yes, but under the Colgate case there is a ruling of the Supreme Court that a man has the right to choose his own customer.

Mr. STEELE. He has the right to choose his own customer, but he can not impose upon him that he shall sell for a certain price.

Mr. MURDOCK. I think that is in the bosom of the court.

Mr. STEELE. Well, it is only an impression I had from that line of cases.

Mr. MURDOCK. I would like to go ahead with section 2 of the Clayton act and clear up my matters, so that Mr. Colver can come on in the morning. Section 2 is the antidiscriminatory section of the Clayton Act. It is strong in the first prohibition, and then it is weakened perceptibly and materially in the subsequent provisos, Also we have found in our activity under section 2 that there is discrimination in buying as well as in selling, and that the discrimination in buying, Mr. Chairman, is usually more frequent than discrimination in selling. What Congress had in mind was that a manufacturer or dealer should not sell to one man for less than to another man, quality, grade, and quantity of goods considered. So, we write that prohibition in our law. But we find another thing going on in the community much more often than we do discriminating in selling, and that is discrimination in buying. A big manufacturer will move into a community to buy his raw material, and will run the price up on his competitors in that community, cripple them, sometimes run them out of business, absorb them, and then drop the price back to normal or below normal again. That is discrimination in buying, and I am suggesting an amendment to the committee, and I am going to read it to get it into the hearings. I propose that section 2 of the Clayton Act be amended so that the amended section will read as follows:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers or sellers, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or where such discrimination constitutes an unfair method of competition or an unfair act in commerce.

Section 3 of the Clayton Act is one in regard to rebates, and to my mind it is an excellent section. It comes into use frequently, and I think always helpfully, and I do not propose that it be changed much.

I think a few words could be added to that section to make it completely workable. Section 3 of the Clayton Act, I think, should be amended to read as follows:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods or other commodities, whether patented or unpatented, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding, or with the effect that the lessee or purchaser thereof shall not use or deal in the goods or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Mr. Chairman, I have added to existing law these words, "or with the effect," and for this reason: If I am making soda-water sirups and go to Mr. Dyer, who runs a soda-water fountain, and put my price list before him, he is induced to deal exclusively with me because my price list recites that if he buys 1 barrel of my stuff it shall be at so much per gallon, 10 cents a gallon; if he buys 2 barrels, it shall be 9 cents; if he buys 3 barrels, it shall be at 8 cents, and so on down the scale, so that as the quantity purchased ascends the price he pays drops. Now, that is in the nature of a rebate, but it is very difficult to prove under our law that it is, and I thought by the inclusion of the words, "with the effect," that we might cover those cases.

Mr. YATES. Do you not think that where a man buys in very large quantities he ought to be permitted to buy at a lower rate?

Mr. MURDOCK. Yes; I think the quantity——

Mr. YATES. If there is no dishonest intent?

Mr. MURDOCK. I think the quantity discount is a perfectly justifiable discount within limits, but this cumulative quantity discount is not a simple quantity discount, in fact, because the quantity is not delivered at once. A small quantity, 1 barrel is delivered, title passes, the deal is closed, the money is paid, but by reason of the fact that I have bought 1 barrel previously I can get a lower price on the next barrel, and I, as the manufacturer of the soda sirup, force my full line upon Mr. Dyer, at the expense of my competitor.

Mr. YATES. I think I see the distinction.

Mr. MURDOCK. Mr. Colver states that I should correct the record and the impression I gave you gentlemen in my recital of how the cumulative quantity discount works. Mr. Colver says that in many instances the cumulative quantity discount carries the price clear back to the lowest price of the last barrel purchased.

Mr. YATES. It is ex post facto, retroactive?

Mr. COLVER. The reason we call it cumulative is because they have one price on 1 barrel, and a lower price on 2, and a still lower price on 3, and a continuing lower price on more. When the second barrel is bought it is bought at the price of 2 barrels, and that price relates back then to the first barrel which was bought on the 1-barrel price. When a third barrel is bought, it is bought on the basis of a 3-barrel purchase, and the discount relates back to the second barrel and the first barrel, so that the effect is the tying of the customer to that particular seller. Having used 5 barrels, and wanting a sixth, he can either start in on a competitor at the 1-barrel price, or he can buy his sixth barrel from the man he bought 5 from, and get not only the sixth barrel price for the 1 barrel, but for the other 5 barrels, so it is clearly an arrangement to tie the customer to his purveyor.

Mr. GOODYKOONTZ. What is unfair about this practice, legally or morally? Has not every other manufacturer the same privilege?

Mr. MURDOCK. Now, in section 7, Clayton Act, Mr. Chairman, Congress provided against a corporation's acquisition of stock in competing companies. I think at the time Congress passed that act it was a wise piece of legislation. But section 7 of the Clayton Act certainly needs strengthening now, because section 7 does not include the word "property." The corporation will now buy not the stock of the competing concern, but its physical property, and the absence of the word "property" in that section permits the merger which Congress sought to prevent. I saw a case last week from Wisconsin which shows you how subtle an acquisition can be, even of stock. A Wisconsin manufacturer sold his interest in his business to a great concern in this way: The manager of the Wisconsin concern turned over to the big company two notes. One, as I recollect it, was to run five years and one was to run seven years. The note which was to run seven years was for a small amount; the other was for a large amount. The Wisconsin man put up in the hands of the big concern as collateral for these loans his stock. While it was not a majority, it gave control in his company. The voting power of that stock was placed in the hands of the concern which made the loan, and an option to purchase the stock was given, and the stock was not returnable to the Wisconsin man until the longer term note, the note for the small amount, was paid. The big concern came into control of the Wisconsin company. I think before the courts of the land in the case of a device of that kind the Government can win. But the Government can not win where there is an acquisition of property instead of an acquisition of stock as the law stands to-day.

Mr. STEELE. Does your amendment prohibit the merger and consolidation of corporations?

Mr. MURDOCK. Section 7 prohibits the acquisition of stock in a competing company, a merger to that extent.

The CHAIRMAN. It does not prohibit the merger of the physical property itself?

Mr. MURDOCK. No; it does not; and I propose here, Mr. Chairman, this amendment to section 7:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the property or of the stock or other share capital of another corporation, partnership, or individual where the effect of such acquisition may be to substantially lessen competition between them, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the property or of the stock or other share capital of two or more persons, partnerships, or corporations engaged in commerce, where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise may be to substantially lessen competition between them, or any of them, whose property or stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

I have inserted the word "property" in addition to the word "stock." I think the addition necessary. The absence of the word "property" from the law is driving these corporations seeking mergers, as Mr. Steele calls them, between competitors, but more properly absorptions, into the actual purchase of the property, not the acquisition of stock. Even as I instanced, where the acquisition of stock is made, it is subtle.

Mr. STEELE. You stated, in the beginning, that the tendency of all business in these days is toward larger business, larger units, but if those larger units are under Government regulation in some way, does it make any difference to the public whether consolidation or purchase takes place, as long as they are under Government regulation or direction?

Mr. MURDOCK. Mr. Steele, no man within my acquaintance can fix a limit upon the magnitude of a unit and say how big it shall get without injury to society.

Mr. STEELE. The Supreme Court has said that mere bigness is no offense.

Mr. MURDOCK. I know that is true. Speaking only for myself, without bringing the others of the commission into it, I believe that there is a legitimate economic limit to beneficial magnitude. As a Government, we are, perhaps, not prepared as yet to take that proposition on, but as an alternative to action along that line, I am convinced as an American citizen that every effort that the Congress, that the executive branch, and, most of all, the courts can employ to keep competition alive, the better for this country. The more competition you can have within fair lines, within decent lines, the safer our journey through tempestuous seas. I think that any normal, human being who will serve as long as one year on the Federal Trade Commission, will, at the end of the year come out of it devoted to the principle of competition. It is not only the life of trade; it is trade itself. You never fully eliminate it, even when your units are large. Competition is still there even when monopoly is stifling it. Now, whether or not, in answer to that question, we have come to the point where, as a government, we shall say to a unit, "Thus far and no farther in magnitude," I am not prepared to say, but, on the other hand, I am prepared to say that every device that the Government can employ to win men to compete and keep them in competition, it should employ. When Congress, in its wisdom, decreed that a corporation in interstate commerce may not acquire the stock of a corporation in interstate commerce, where the effect of the acquisition was to lessen competition, I believe that was a beneficial law. It is not as beneficial, as it should be, because these big companies are not buying the stock, they are buying the property. The effect is the same. Our law in that respect is a short ladder.

Now, you asked me whether or not the big unit is more serviceable to society. My answer is, with my present lights, no, it is not more serviceable. I think the tendency of the big unit in commerce, either through combination or otherwise, wherever it approaches the realm of monopoly, is to exact an unjust toll from the community. In this connection just a superficial survey of the commerce and industry of this country will convince the wayfaring citizen that the concentration of wealth through various channels is still in progress, and always at an accelerated rate, and not to the advantage of the people.

Take this general discussion throughout the country about the high cost of living. There are many ills, many doctors, many remedies offered. No man, perhaps, can catalogue them all. A man on the Federal Trade Commission, however, becomes aware of certain industrial tendencies, tendencies which are guiding control in industry back to basic materials. If you want a complete survey of

the United States and its industries to-day, you can not get a survey that is intimate and illuminating, unless you go back to the point of basic materials and the control of those basic materials, fuel, lumber, steel, cereals, meats, leather, and textiles.

The CHAIRMAN. And oil?

Mr. MURDOCK. Well, oil is fuel. You can take all of those basic materials, you can take coal and petroleum, that is fuel, you can take lumber, you can take steel, cereals, meats, textiles and leather, and you have covered everything that goes on a man's back, over his head in the shape of a roof, and into his stomach as food. Every one of these industries, gentlemen, deals in basic things, and in each one of these industries there is an accelerated concentration of wealth and control. For that reason, I believe, Mr. Steel, that the time will come when this Nation will stand face to face with the problem of mere magnitude alone.

Mr. STEELE. Was there any real benefit to the public caused by the dissolution of the Standard Oil Co., either by a reduction of price or in any other way?

Mr. MURDOCK. No; and for the reason that the Standard Oil dissolution is not visible to the naked eye. You can not see it. The Standard Oil Co., under the decree of dissolution, divided into different companies, the idea being to have a common stock interest and control. I remember that Herbert Knox Smith, then director of the Bureau of Corporations, after the Standard Oil decision, said that that was precisely what would happen—that they would divide among the holders of the Standard Oil stock fractional stock in the different companies, and the same men would control all the companies instead of of the same men controlling one company.

The CHAIRMAN. The same thing happened in the Great Northern dissolution.

Mr. DYER. And in the American Tobacco Co. case.

Mr. MURDOCK. I think the word "property" should go in section 7, Clayton Act, and I do not think it is going to work a hardship upon anyone and that it will benefit the community.

Now, section 8. I do not care to press this to any great extent, but section 8 limits us in interlocking directorates to corporations of $1,000,000. It has been suggested in the commission that that be reduced to $500,000.

Now, Mr. Chairman, coming back to your proposition, refusal to sell, and then I am through. Here is your idea, expressed in a proposed amendment:

> That it shall be unlawful for any person, partnership, or corporation engaged in commerce, directly or indirectly, to fix or attempt to fix or maintain a price for which its goods or other commodities shall be resold by the first or any subsequent purchaser thereof, or to refuse to sell same on account of a refusal or failure by any purchaser to maintain a resale price.

Now, the above is suggested only on condition that Congress does not adopt the plan for price maintenance, which the commission has already recommended to it. Some restraint in trade is due, Mr. Chairman, to the fact that the manufacturer tries to make the retailer maintain a resale price, by refusal to sell.

The CHAIRMAN. As long as the wholesaler can refuse to sell to any one that does not maintain it, this statute will be void.

Mr. MURDOCK. The commission proposed to Congress some time back that the resale price could be maintained if a governmental

body like the Federal Trade Commission were authorized to pass upon the fairness of that price if challenged by any party at interest.

The CHAIRMAN. But that is still eliminating competition??

Mr. MURDOCK. Yes; but I subscribe personally to that—and I am speaking purely personally—because the manufacturer with a trade-marked ware does have a moral right in that ware after it has left him, he has a right in its good name. He has no legal property right, after the title passes; I realize that.

The CHAIRMAN. It is true, Mr. Murdock, that anybody can get a trade-mark, and that every article in trade, if you pass that law, would naturally become trade-marked, and that would allow the fixing of the price for everything that is sold in commerce.

Mr. MURDOCK. Well, I think not, Mr. Chairman.

The CHAIRMAN. Flour, butter, and I guess even eggs, could be trade-marked.

Mr. MURDOCK. I suppose they could.

The CHAIRMAN. They may trade-mark practically everything.

Mr. MURDOCK. It is perfectly plain to my mind that when goods pass from the manufacturer to the dealer, and the title in them has passed, that the goods belong to the dealer; they are his goods, and he ought to have the right to do with them as he pleases, but not to the injury of the good name of the ware. But as the community is organized at present, if you are the retailer, Mr. Dyer, and you do not maintain the price on the goods that you have bought, and in which you have title, you will probably get no more of those goods.

Now, since the Miles medical case, which you mentioned, was decided, there has been another case. This went up from the district of Virginia to the Supreme Court on a demurrer to an indictment. It was a criminal proceeding, the Colgate case, and the Supreme Court held, in effect, that a man had a right to choose his own customer.

The CHAIRMAN. I made some comments on that provision when the thing passed this committee.

Mr. MURDOCK. Now, if Congress is not going to give the commission or some other governmental body the duty to umpire prices maintained on resold goods, then Congress ought to give us the amendment that I have suggested, which will give supervision over this proposition, because trade is restrained at times, as the chairman suggests, by this device as at present employed.

There is another further suggestion of amendment which I will not discuss. Congress, through an oversight, did not give us jurisdiction over commerce between this country and the Philippine Islands. We did not discover that until very recently, and I would suggest this amendment to section 4 of the Federal Trade Commission act. At the conclusion of the paragraph defining commerce add the following:

or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State of the United States or the District of Columbia or any foreign nation.

The only change in that being that it gives jurisdiction over commerce between the United States and the Philippine Islands. We have not that now. The law was so framed that it left the Philippines out.

To summarize, I here insert in the report the amendments I have proposed:

I. That the first paragraph of section 5 of the Federal Trade Commission act be amended so that as amended the paragraph will read as follows:

"That unfair methods of competition, or unfair acts in commerce, or affecting commerce, are hereby declared unlawful."

With the changes in the procedural provisions of the sections following the first paragraph necessary to harmonize all the paragraphs of the section with the proposed amendment.

II. That section 5 of the Federal Trade Commission act be amended by the addition of the following paragraphs:

"All orders of the commission shall remain in force and effect until modified or set aside as provided in section 5 of this act, and it shall be the duty of every person, partnership, or corporation, against whom the same may be issued and served, their officers, agents, and employees, to observe and comply with the same, so long as they remain in effect.

"In case of failure or refusal on the part of any person, partnership, or corporation, to comply with the terms of any order duly made by the commission under the provisions of this act, such person, partnership, or corporation shall be liable to a penalty of $500 for each such offense, and $25 for each and every day of continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

III. That section 6 of the Federal Trade Commission act be amended in paragraph (*b*) where the word "corporations" first occurs by striking out the word "corporations" and inserting in lieu thereof the words "persons, partnerships, or corporations."

IV. That section 6 of the Federal Trade Commission act be amended in paragraph (*g*) by striking out the word "corporations" and inserting in lieu thereof the words "persons, partnerships, or corporations."

V. That the Federal Trade Commission act be amended by the addition of the following section, to be designated section 6½: "Whenever from any investigation authorized to be conducted under this act, the commission shall have reason to believe that any person, partnership, or corporation engaged in commerce has been or is in its organization, business, conduct, practices, or management violating the antitrust acts, or that the same will substantially lessen competition or tend to create a monopoly, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and shall proceed in reference thereto in all respects as provided in section 5 of this act.

"If upon the hearing the commission shall be of the opinion that the method of organization, business, conduct, practices, or management is prohibited by the antitrust acts, or that the same will substantially lessen competition or tend to create a monopoly, it shall make a report in writing in which it shall state its findings as to the facts and shall issue its order to cease and desist, or to readjust its organization, business, conduct, practices, or management as ordered.

"The commission or any party made a party to the proceeding provided by this section may apply to the proper circuit court of appeals of the United States under the same terms and under the same conditions as is now provided in section 5 of this act."

VI. That the Clayton Antitrust Act, section 2 thereof, be amended so that as amended said section 2 will read as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers or sellers, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or where such discrimination constitutes an unfair method of competition or an unfair act in commerce."

VII. That the Clayton Act, section 3 thereof, be amended so that the same, when amended, will read as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods or other commodities, whether patented or unpatented, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, understanding, or with the effect that the lessee or purchaser thereof shall not use or deal in the goods or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

VIII. That the Clayton Act, section 7, be amended so that the first and second paragraphs thereof, when amended, will read as follows:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the property or of the stock or other share capital of another corporation, partnership or individual, where the effect of such acquisition may be to substantially lessen competition between them, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the property or of the stock or other share capital of two or more persons, partnerships or corporations engaged in commerce, where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between them, or any of them, whose property or stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

IX. That the Clayton Act, section 7 thereof, be amended by adding after the second paragraph of said section as above amended a new paragraph, as follows:

"That it shall be unlawful for one or more owners of the stock or other share capital of a corporation engaged in commerce to acquire, either directly or indirectly, a controlling interest in the stock or other share capital of another corporation, where the effect may be substantially to lessen competition between the two corporations in any section or community, or tend to create a monopoly in any line of commerce."

X. That the Clayton Act, section 8 thereof, in the third paragraph thereof, be amended by striking out the figures "$1,000,000," and inserting in lieu thereof, in figures, "$500,000."

XI. That the Federal Trade Commission act be amended by the addition of a section to be known as section 3A, or any proper designation, as follows:

"That it shall be unlawful for any person, partnership or corporation engaged in commerce, directly or indirectly, to fix or attempt to fix or maintain a price at which his goods or other commodities shall be resold by the first or any subsequent purchaser thereof, or to refuse to sell the same on account of a refusal or failure by any purchaser to maintain a resale price."

(The above is suggested only on the condition that Congress does not adopt the plan for price maintenance which the commission has already recommended to it.)

XII. That section 4 of the Federal Trade Commission act be amended by adding, at the conclusion of the paragraph defining "commerce," the following:

"or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State of the United States or the District of Columbia or any foreign nation."

That concludes my statement.

The CHAIRMAN. We are very much obliged to you.

(Whereupon, the committee adjourned to meet to-morrow, Tuesday, September 9, 1919, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, September 9, 1919.

The committee met at 10.40 o'clock a. m., Hon. Andrew J. Volstead (chairman) presiding.

Present: Messrs. Morgan, Dyer, Currie, Boies, Yates, Goodykoontz, Igoe, Gard, Whaley, and Steele.

STATEMENT OF MR. WILLIAM B. COLVER, MEMBER FEDERAL TRADE COMMISSION.

Mr. COLVER. Mr. Chairman, and Gentlemen of the Committee: I should like to supplement somewhat some of the things that Mr. Murdock said yesterday with respect to the procedure of the commission, not because Mr. Murdock did not make it entirely clear, but because so much emphasis is placed in criticism upon the manner of procedure of the commission that it seems only reasonable that some

emphasis be made by the commission in attempting to get clearly into your minds, and with the emphasis of repetition, the points as to the procedure concerning which constant criticism is made.

There are three proceedings before the commission, and it is the confusion, sometimes inadvertent and sometimes I am bound to believe purposeful, of the three procedures that lend color to the criticism. The three proceedings are, first, an investigation by the Commission, by the direction of Congress or of the President, for the purpose of gathering certain information to be placed before Congress for its use in legislation or to be placed before the President for his use or the use of the executive departments in their administration of the law. An investigation undertaken by the commission pursuant to the direction of Congress or of the Executive is not an adversary proceeding. It is a proceeding——

The CHAIRMAN (interposing). You are speaking now of a general investigation and not a proceeding for the purpose of having a complaint issued; are you not? Do you make a distinction between the two, just simply a general investigation, or an investigation with a view to issuing a complaint?

Mr. COLVER. That is the distinction, Mr. Chairman. Sometimes the congressional resolution will ask for a general survey of the situation for an industry and sometimes it asks whether or not certain states of fact exist. One would be general and the other would be specific, but they are both the same as to procedure. Now, as to procedure, an investigation of that sort is not adversary proceeding. It is not carried on by the usual methods of a trial. The Federal Trade Commission under the law finds itself in the position of going out to do for Congress or a Committee of Congress or for the Executive or for an executive department, that investigating which the asker of the question would do had he the time and facilities to do it, and the report is made in response to the inquiry directly. That is not an adversary proceeding.

The second sort of proceeding we have is the proceeding on an application for complaint. The proceeding on an application for complaint is an interoffice affair. Complaint is made to the commission by a business concern or a citizen that an unfair practice in competition is being indulged in by some person named or sometimes by somebody unknown. In such cases the commission proceeds in an interoffice way through its staff to determine prima facie whether or not it has reason to believe that the complaint warrants formal proceedings. That is not an adversary proceeding. To go through a complete trial of a case with the prospective respondent present, with the production of witnesses, would result in an attempted trial of a case the issues of which had not been made up. It would be an attempt to try a case before the case had been stated.

What the Federal Trade Commission does do under that procedure is to assemble ex parte, but almost invariably after talking with and consultation with the prospective respondents, on the part of its staff, assemble a state of facts upon which the commission says, "if these things are true, then an unfair method of competition is being pursued," whereupon a written formal complaint is prepared.

As to the application for complaint, if it went through a full trial, it would be not at all easy to give full trial to a cause before issue had been joined, before the issues had been defined. It would be impos-

sible to know what witnesses were speaking to the question and what witnesses were not. Also if the commission heard the case clear through on the application for complaint and then issued formal complaint, the same gentlemen who are now complaining that that is not done would be heard to complain, and I think with a great deal more reason, that the final trial under the procedure laid down in the act, where we are bound by the direction of Congress as to how we shall proceed, has been prejudiced; that our minds had been foreclosed. They would say, and truly, "Why, these men before they issued any complaint had tried the whole thing and made up their minds. What is the use of contesting an action like that?" We say that that application for complaint is not the place for the adversary proceeding. Now, having developed ex parte a state of facts not accepted, the commission says: "If these are facts, then unfair competition exists. Therefore we will reduce to writing a statement which includes these alleged facts; we will serve that and then follow direction given us by Congress as to procedure," and we have followed your procedure scrupulously.

The CHAIRMAN. As I understand the character of this proceeding, you employ attorneys or inspectors of some kind for the purpose of ascertaining the facts and those men do not find or pass on anything.

Mr. COLVER. Oh, not at all.

The CHAIRMAN. They submit those facts to one commissioner and that commissioner passes upon the question of whether or not they are sufficient to warrant a complaint. He submits it to the full commission and the full commission says that if there is a sufficient cause for complaint then it will issue the formal complaint and a trial can take place after that, practically with open minds, so far as the commission is concerned, because the commission has not gone to work and made the investigation primarily and has not formed any opinion as to what is the truth in reference to the matter.

Mr. COLVER. Yes, Mr. Chairman, and there are at least three steps in safeguarding the procedure that are omitted from your very good statement of the general plan. The application for complaint is received, it goes to the chief examiner, he turns it over to one or two of his staff, and they report immediately whether or not, on that statement, jurisdiction appears—whether or not it is interstate commerce and other jurisdictional questions. Then he finds whether, if the statement in the application be true, it warrants taking jurisdiction of the matter.

This examiner makes his investigation much as the law clerk does. I do not know whether they have law clerks nowadays or not, but the law clerk or junior member of the law firm goes out to look up witnesses and see if he has a lawsuit before filing the petition. The investigating attorney, if he runs into economic questions, calls upon the economic division through the proper channels and gets assistance there. Then he reports back what he has found to the examiner and the chief examiner tests that with a wider knowledge and a sounder judgment, and, if in his opinion (and he expresses no opinion as to whether or not there is cause for a formal complaint), but if the facts have been assembled so that the question is fairly exhaustive as to the prima facie or affirmative side of the question, it is passed on to the board of review composed of two attorneys and one layman, skilled economist, and all members of the staff.

These men know nothing whatever about the case until it comes to them and have no interest in it, and after it leaves their hands they are entirely outside of it. These men present it to the commissioner in charge in a carefully written opinion. They digest the facts and digest the law, always with the qualification "if these facts be true," and make the recommendation that the whole matter be dismissed or that formal complaint be issued.

Now it comes to the commission and only one commissioner knows anything about it up to this time, and he either agrees or disagrees with the board of review and the commission either sustains him or the board of review, if there be a conflict of opinion. If complaint is ordered the commission sends the matter to the chief counsel with the direction to prepare a formal complaint. Now, the chief counsel is charged with sustaining the complaint which he draws, much as a lawyer is charged with sustaining the petition that he files in court, but the commission is not concerned with the proof of the thing up to this time. They are only saying, "if this representation is true it would appear that an unfair method of competition is being indulged in."

The chief counsel comes back rather infrequently and says, "I do not find it easy to draft a complaint. There seem to be some missing factors here. When we come to reduce this down to a brief writing which will form the foundation of this dispute, I do not seem to find that we have the necessary foundation."

The commission may hear him, and it does frequently, and on his showing may dismiss the application. Or the commission may, on his suggestion, or without his suggestion, send it back—not to the board of review but to the chief examiner—and say, "There are three missing things here and if they can not be supplied there is no cause." The chief counsel, however, if he has successfully prepared the formal complaint, presents that to the commission, and the commission directs its issue if it agrees to the form of the complaint.

Now comes the operation of the procedure laid down in the law. This is the third proceeding. A copy of this formal complaint, which is in all respects similar to a petition in court, is served upon the respondent. Under the law he has not less than 30 days (and we have made the rule day 40 days) for his written answer, and upon a written complaint and the written answer, issue is joined. I submit that that is the place in any sort of legal practice for the adversary proceeding to begin. That is the first time you have defined, from both sides, what this proceeding is about.

The CHAIRMAN. Is there a reply to the answer?

Mr. COLVER. There is no reply.

Mr. IGOE. Mr. Colver, may I ask you right there, what is the proportion of complaints actually issued to the number of applications for complaints? That would give us some idea of the sifting out process.

Mr. COLVER. The number ran about a year ago about one out of four—one complaint was issued out of four applications for complaint. As the practice of the commission has become known and as more cases have been disposed of and the points on which they turn have become better known to the business world, applications for complaints tend to be more sound when they come to us, so that the number of complaints that are being issued now, with respect to the

number of applications that are received, is approximately one-third as against one-fourth, and that comes from two reasons: Prospective complainants, if we can call them that, feeling hardship, may look over the cases that the commission has passed on and find that they have no remedy for their case—that is, if they have their attention called to the absence of the interstate-commerce feature of the case, or something of that sort—and so they do not make their application. Secondly, as rulings are made and cases are decided, a business concern—and in the main, business is ever alert to adapt itself to lawful practices—having seen a decision on a practice that it, itself, is indulging in, tends to eliminate it itself. I often feel that in the decision of one case perhaps 50 or 100 or an indefinite number may have been decided and the remedy brought to business concerns of which we will never know.

Mr. DYER. Mr. Commissioner, may I ask you a question? How long has this been the policy of the commission to have the complaints kept in secrecy? That is, a man makes a complaint against somebody charging unfairness and it is the policy of the commission, as I understand it, to keep that matter a secret and refuse to divulge the name of the man who made the complaint. How long has that existed, and what is the reason for it?

Mr. COLVER. I would like to meet that question and meet it squarely and without the slightest criticism of the question. I divide it in replying. The question is, How long has it been the custom of the commission to keep these matters a secret and to refuse to divulge the name of the complainant? It has never been and is not now the custom of the commission to keep these complaints a secret. It has always been and is now the custom of the commission not to disclose the name of the complainant.

Mr. DYER. Is that an order of the commission or one of the rules that you have adopted?

Mr. COLVER. I can not say whether it is a written rule, but it is very clearly known.

Mr. DYER. I was told by the attorney, when I asked the name of a party who had complained against a constituent of mine, that it was absolutely forbidden by order of the commission to give that information even to a Member of Congress.

Mr. COLVER. As to the identity of the complainant?

Mr. DYER. Yes, sir.

Mr. COLVER. Yes; I think that is true.

Mr. DYER. What is the reason for that? The matter goes into court, and the party complained against, if the complaint is issued, has a right to take it to court and get the commission's ruling reversed. Then there is no way to prevent it.

Mr. COLVER. Every way in the world. The complainant is not a party to the suit. The commission is.

Mr. DYER. Do you mean to say that the commissioners, or whoever are put on the witness stand, would be privileged to decline to answer who made this complaint?

Mr. COLVER. Well, it has never been asked in court yet. If I were called to the witness stand and called upon to disclose the name of the complainant in the case, I would decline to do so except under the direct order of the court, and I would ask my counsel to combat such an order being made.

Mr. DYER. What is the reason for that?

Mr. COLVER. The reason for it is this: When a business concern is suffering in unfair competition which is either going to cripple him or kill him commercially, and when the law says that that thing shall be done, not in his interest but in the interest of society, in the interest of the business world as a whole, then the United States and not the complainant is the injured party. The complainant often comes to the commission and says, "I would like to complain, but I do not dare because before you can save me they will kill me commercially, and I will be subject to devious attacks, and what I am getting now will not be a marker to what I will get if I am known to be the complainant in this case;" and when big men as well as little men are in terror of their more powerful competitors or of their several equally powerful comeptitors banded together, there is good reason to conceal their identity. It is not a question of the man himself who complained, it is society, it is the Government of the United States which complains because its laws are being violated.

Mr. MORGAN. What percentage of the cases that are brought against business men after the notice has been served agree to discontinue those unlawful practices without any formal trial?

Mr. COLVER. A very large number.

Mr. MORGAN. What percentage would you say?

Mr. MURDOCK. Mr. Colver, will you insert in the record an answer that I have had prepared that answers the question, and shows that a large number were disposed of.

Mr. COLVER. Thank you. [Reading:]

There have been 1,401 applications for complaints before the commission since the foundation of the commission. Of these, after ex parte examination, 673 were dismissed without public notice or knowledge. That is, without anything in the public prints whatever. 392 are not in process of such examination With respect to the remaining 336 applications for complaint, the formal complaint of the commission issued, and of the 336 adversary proceedings, formal complaint proceedings, 176 have been disposed of, while 160 are pending. Of the 176 disposed of, 23 were dismissed, the respondents having made sufficient showing of defense. In the remaining 153 cases, the order to cease and desist was issued, and in 134 of these instances, that order to cease and desist was issued by and with the consent of the respondent. In the remaining 19 cases, the action went through trial and argument, and resulted in an order to cease and desist. Out of the whole number only in six cases has the respondent been moved to avail himself of his right of appeal against the findings of the commission to the Circuit Court of Appeals of the United States. In one of these cases the commission's order was affirmed and in another it was reversed. A petition for certiorari to the Supreme Court of the United States has been filed in the latter case. Decisions have not as yet been rendered in the other our cases.

Mr. BOIES. May not the commission act on its own initiative in the first instance without any formal complaint filed?

Mr. COLVER. The commission might act, but it does so only in a relatively small percentage of the cases.

Mr. BOIES. They why may not a man come before you if there is danger of destroying his privileges, and apply to you orally?

Mr. COLVER. Oh, yes; that can be done.

Mr. STEELE. Then would not the commission issue a complaint on its own motion?

Mr. COLVER. Sometimes the commission substitutes its own name for the name of the complainant, if it thinks that he would be destroyed.

Mr. STEELE. But the commission would not undertake to enter the final judgment without the usual procedure in that case?

Mr. COLVER. Oh, certainly not.

Mr. BOIES. Then I suppose the reason the commission keeps the name of the complainant a secret is due somewhat to the fact that the complainant might be bribed to fall out and fail to carry on the proceedings, so far as he is concerned, or refuse to give evidence?

Mr. COLVER. I have never been conscious of that feeling myself. I have only been conscious of the feeling that when a man comes in and sits at my desk and says, "I want the redress that the law offers me, but I am afraid to ask for it, because I would be crushed and ruined if I were known to have done it, but if I can get this redress, if it is lawful that I should have it, and if it can be given to me without my identity being disclosed, I would like to have it, but as between that and having them know that I asked for it, I would rather take my chances." When a business man says that to me, in the absence of any direction to the contrary in the law, I am inclined to doubt whether any harm has been done in keeping his name a secret.

Mr. GARD. Would not this fear to make known his identity warrant an assumption on the part of the commission that that in itself is the result of the illegal practice which should be remedied? In other words, somebody on the outside was attempting to coerce and to crush him because he wanted the right thing done?

Mr. COLVER. Yes. If a business man is suffering either slow strangulation or murderous assault, one of the symptoms would be an evidence of fear on his part.

Mr. GOODYKOONTZ. Could not you put it in the same category as the hearing before the grand jury where the party who is indicted has no concern about who goes before the grand jury, because that is an initial proceeding that does not concern him in the least?

Mr. COLVER. Quite true. That is an exact statement.

Mr. MORGAN. Are the facts generally such that the party complained of would have a suspicion as to who was making this complaint? Is it your view that ordinarily a man who is called before the commission has a suspicion and knows pretty well who is the complainant, although he is not disposed to name him, or is the injury done to so many business men that he does not have any really good ground for suspecting the right one? How is that?

Mr. COLVER. Yes; they sometimes do suspect and sometimes the person complained against comes and makes just as earnest a plea for the disclosure of the identity of the informant as the informant has made for the concealment of his identity. In some cases where a man in that situation reflects bona fides in his action, I have said, "Whom do you suspect? I may answer you and I may not; but who is it?" He would name somebody and if it was not the complainant I would say, "Well, you are wrong; that is not the man." They sometimes think that perhaps it is a business competitor trying to use the processes of the commission to really make an unfair attack and in that case we are glad to tell him who is not the complainant, but we do refuse, and I think properly, to disclose the identity of the complainant if the complainant requests it.

Mr. IGOE. When the formal complaint is filed, the respondent has an opportunity to appear?

Mr. COLVER. Yes, sir.

Mr. IGOE. Are the witnesses who appear in support of the complainant then made known to the respondent?

Mr. COLVER. They are made known to the respondent, and he is privileged to meet them face to face and cross-examine them after the formal complaint and answer—after the issues are made up.

Mr. STEELE. At the time of the trial?

Mr. COLVER. Yes, Sir. Now, let us take the sort of procedure that is requested by our critics and see how it works. Naturally, if you are going to have a proceeding held in a Government department it can not be anything but an open, public hearing, because no star-chamber proceeding would be tolerated——

Mr. STEELE. Is private counsel permitted to appear in support of the complainant?

Mr. COLVER. Oh, no; not in support of the complaint; only to the extent that a party in interest may ask to be allowed to intervene, and, having intervened, he is made what the lawyers would call a party defendant, not because he is guilty of the acts charged, but because he wants to get into court in the case. Those applications for intervention are very rare.

As to participation of private counsel for the complainant, that is discouraged. The commission carries forward the matter in its own name and with its own counsel. If it receives assistance from private counsel, adversary to the respondent, that private counsel must work in the open and he and his client must be known to the adversary.

Let us return to the procedure that has been suggested by our critics. Suppose, on the application for complaint, witnesses were called and examinations were had, all in public. Under those circumstances a man could file a complaint filled with all the most outrageous charges in the world and you would have the spectacle of a business concern dragged into a public hearing to meet the most outlandish charges in public, and you would have it printed from one end of the country to the other.

True, the case might fall in the end, and it would fall in the end, but that would not prevent its being written into the record and being printed in the papers all over the country, and a thousand times more harm would be done than under the present methods.

Under the present method the complaint is taken and sifted down to at least a reasonable statement of facts, and the wild stuff, the guesses that the complainant makes about his competitor and his suspicions about him, are all winnowed out and when the case comes into the daylight we have trimmed away and cut away any blackmail and slander, if there was any in there, and cut it down to plain cold allegation of fact. We have narrowed down to a complaint which may be sustained or dismissed.

But the thing that we are most frequently asked is this: Constantly a concern having knowledge, by reason of the visits of the commission's investigator to it, that it is being investigated upon application for complaint, comes to the Commission in person or by attorney and says, "Do not issue a complaint against us. If there is anything wrong we will correct our practice." Often they say: "Nothing that we do is wrong, but if there is anything that you think is wrong, if there is anything you would like to have us do, we will do it."

Of course, that second course is unthinkable. It is unthinkable that a Government official should let a man come in and say, "I am doing no wrong; I am conducting my business in a proper, decent, and legitimate way, but if you do not like it, you indicate anything you would like to have me do and I will do it." That is unthinkable. The Government official who would do a thing like that would be a super-Czar, imposing his own will on an innocent man. It can not be done. So that has to go by the board on the face of it.

Mr. MORGAN. Without interrupting you, I have wondered what is the class of business men or corporations against whom these complaints are generally made. That is to say, are they large corporations, corporations controlling a very large proportion of the business in their line, or are they generally small corporations that have no particular element of monopoly? What is the general character of your respondents?

Mr. COLVER. They range all the way from the small manufacturer of an electric curling iron to the Standard Oil Co. and the United States Steel Corporation.

Mr. MORGAN. That is, the dominant number is the large corporation?

Mr. COLVER. I would not think so. The large corporations are not in competition. The large corporations are in the enjoyment of substantial monopoly. I would say that the greatest majority of the cases that come to the commission are that body of medium-sized business concerns of about equal strength who are now engaged in the remnants of the pleasant art of competition in this country.

Mr. MORGAN. Now, if it is along that line, I would like to know if you classify these complaints. What is the general character of these complaints, what are the acts complained of, what are the wrong acts generally complained of, if that has not been already gone over?

Mr. COLVER. It is so difficult to estimate or to attempt a summary that if you will permit me I will insert in the record a complete list taken from the annual report, but if you want it as a basis for questions——

Mr. MORGAN (interposing). I would like to know generally what the wrongs are that are complained of. I would be glad to have that list from your annual report in the record.

Mr. COLVER. Then as a basis for questions I will give you something that I will not pretend to call an exact or complete schedule. You ask for the general character of the complaints that are made. There is espionage, enticement of employees, securing business secrets, secret discounts, tying contracts—tying one sort of merchandise to another—false advertising, misrepresentation of competitors' goods, derogation of competitors' goods, derogation of competitors' business methods with especial reference to his credit in such transactions as require the sale of goods for future delivery at a considerable distance in time. It is not at all conducive to keen competition to be told that "if you buy from that fellow he will probably be out of business before delivery day comes because he is unsound in his credits." Another complaint is simulation of names, where one concern has built up through honest dealing and good practices a valuable name, a name that has good will, and then to have some one find a post-office address that is similar and adopt the name for his trade firm or corporation that is so similar that confusion results.

(The list of causes was later supplied and is as follows:)

In the applications involving unfair methods of competition the practices complained of, which were alleged to be unfair methods of competition, include:
Advertising: False and misleading. Refusal to accept.
Bogus independents.
Commission's letter, misue of.
Commission's order, disobedience of.
Combination of buyers to force down prices by refusal to purchase.
Conspiracy: To injure competitor. Black lists. To eliminate competition and maintain exorbitant prices.
Contracts: Abrogation of. Exclusive agency. Exclusive dealing (full line forcing). Inducing breach of.
Defamation: Libel. Slander.
Division of territory.
Direct selling to consumers by producers and wholesalers.
Discounts: Quality or grade. Quantity.
Discrimination, price.
Disparagement of: Goods. Business.
Employees: Bribery of. Enticement of.
Espionage.
Fraudulent marking of goods.
Impairment of competitive power of other concerns by stock control.
Intimidation: Threats. Boycott. Molestation or obstruction.
Joint selling agencies.
Holding back shipments to increase price of product.
Limitation of outputs, agreements.
Misbranding.
Misrepresentations.
Mergers.
Making up cost sheets "in reckless disregard of true costs."
Monopoly.
Nondelivery of goods on bona fide orders.
Open price exchanges.
Organization of "trust" to increase prices.
Passing off: Of goods. Of name.
Patents and copyrights, infringement of.
Price agreements.
Price cutting: General. Local. Free goods or premiums (trading in).
Price enhancement of product.
Price enhancement of products, combinations.
Price enhancement of raw material.
Price fixing: By associations and combinations. By individuals and corporations.
Prices, charging excessive for necessary supplies.
Prosecution and persecution of alleged infringers of patents.
Rebates.
Refusal to sell.
Refusal to furnish repair parts.
Refusal to furnish service, at instigation of competitor.
Restraint of trade.
Restraint of trade, combinations.
Resale price maintenance.
Selling certain products at a loss and recouping on others.
Suits, malicious and wrongful.
Spurious inquiries for estimates.
Simulation of slogans.
Supplies, cutting off of competitors.
Unauthorized use of trade-mark.
Using cars obtained for Government purposes for private purposes.

Mr. BOIES. Has the question ever been raised with reference to the law covering all this broad field that you have named, giving the commission the authority to make men behave themselves?

Mr. COLVER. In each one of the cases, the general classes that I have spoken of; cases have been brought a number of times, many

times. The courts are open and the scope of the law and the jurisdiction of the commission have not been questioned——

Mr. CURRIE. What does the commission do in those cases where a man is charged with speaking falsely or in derogation of another man's business, and where there is remedy at law?

Mr. COLVER. I mean the courts would be open for appeal. If our decisions in those cases have not been right and proper, the courts are open for review.

Mr. CURRIE. What advantage would there be in going before the Federal Trade Commission in cases such as I have suggested?

Mr. COLVER. That brings up an important question, for which Congress in its wisdom has very carefully provided and which we live up to very carefully. Early in the history of the commission that very point was raised and a respondent would seek to put in as a plea in bar the fact that there was adequate remedy at law. But Congress provided otherwise. Congress said when the commission shall have reason to believe that an unfair method in commerce is practiced "and it shall appear to be in the public interest that further proceedings shall be had," then it shall issue its formal complaint. So that unfair competition is a wrong in common law and—if there is no wrong without a remedy, in equity at least—any sort of unfair competition should find a hearing in a court of equity if not in a court of law.

Mr. CURRIE. Mr. Colver, the point I have in mind is this. What judgment would be rendered by your commission which would be different or more effective than the judgment of a court? For instance, you say it is wrong and tell him to quit. What else would you say?

Mr. COLVER. Nothing; and the order to quit is a permanent injunction. That is what he would get in equity. If there are any damages he would resort to a court of law.

Mr. GOODYKOONTZ. What advantage would the complainant get from your order which he would not get from an appeal to the court? What advantage would there be in coming to your tribunal rather than into a court? Would you dispose of the matter with more facility or with more effectiveness?

Mr. COLVER. Yes, I think answers might be made from several approaches to your question. In the first place the hearing and the trial of the matter would be less formal. It would be less bound by the strict rules and you would come more nearly to getting a complete expression of the facts and the commission would feel free to inform itself as to the general condition of the trade affected by that practice, whether or not the public interest as well as the two adversaries were affected by it. I think the judgment would be more speedy than in an action at law. The judgment, having been granted, would leave all the remedies at law and in equity for the parties anyway. It is not a bar to any private law suit.

Mr. GOODYKOONTZ. The main difference between proceedings in court between litigants themselves would be that here the Government originates the complaint itself and by this procedure that you have outlined.

Mr. COLVER. Yes, sir.

Mr. MORGAN. Mr. Colver, I do not know whether it has been gone over or not, because I could not be here yesterday, but I would be

interested in knowing, if you desire to make a statement, what can be done by Congress to make the Federal Trade Commission more beneficial and effective. In other words, do you come here making suggestions of necessary legislation that you need, or have you made them already?

Mr. STEELE. A number of suggested amendments were made yesterday in your absence, Mr. Morgan.

Mr. MORGAN. Then I do not care to go into it again.

Mr. COLVER. I have taken a great deal more time on this procedure now than I expected to and I hope I have not wearied the committee with it.

Mr. STEELE. It has been very interesting and informing, and I would like to ask one more question before you leave it. You referred to a trial. Is that a public trial in which only one member of the commission sits or the whole commission sits?

Mr. COLVER. The trial is had according to the procedure laid down by Congress; that is, by the whole commission, by a commissioner, by any number of commissioners, by an examiner delegated by the commissioners. And in any case the hearing is an open one and the evidence is reduced to a written record. The referee or the attorney digests or briefs the record and the respondent's attorney makes his brief and then, before the whole commission, a quorum being present, of course—I mean that the commission would not refuse to sit if one member was ill, but in the usual sense before a full commission—the case is fully heard on the briefs and the argument of counsel.

Mr. STEELE. On the hearing, do the legal rules as to the admissibility and competency of evidence apply?

Mr. COLVER. The proceeding is very much like a hearing before a referee or master. Where these hearings are had, for the accommodation of parties, often times, in different parts of the country, in order that it may not be necessary to come back to the commission and have a ruling on the point of admissibility of evidence, the evidence is offered and the master or commissioner who may be hearing it can rule it out if, in his judgment, it is obviously not admissible, but if there is any doubt in its favor the exception is saved and, at the time of the hearing before the full commission, the exception can be argued and the whole line of testimony, the particular testimony or the particular answer or question can be ruled out.

Mr. STEELE. Then you do endeavor to apply the legal rules?

Mr. COLVER. Oh, yes; very carefully. Now, just one word in regard to criticism of the procedure of the commission.

The CHAIRMAN. Mr. Colver, if you will pardon me, I think we would like to know more particularly what suggestions you may have as to legislation. I think we are pretty well satisfied as to the procedure. I have heard no complaint myself.

Mr. COLVER. Of course, I yield to the chairman, but if I could have three minutes to finish the last point, I will be glad to take up the question of legislation.

The CHAIRMAN. You may proceed in your own way.

Mr. COLVER. So long as it is insistently said that we are disregarding the directions that you have given us and that our proceeding is a disorderly proceeding, and that the duties that you have laid upon us are not being carried out in an orderly and a proper way, we can not come before you here and suggest the giving to us of any further

duties. I am not talking about power now, I am talking about duties.

Mr. YATES. Who is it that persistently says this? The Chairman has said that he has heard no complaint. I am not asking for the names of individuals, but from what source does this complaint come?

Mr. COLVER. Well, if I were going to try to find the wellspring of it I would go to the Chicago bar.

Mr. IGOE. Have not the complaints come largely on account of the investigations under the direction of Congress and of the President rather than on the proceedings for application for complaint and complaints against unfair practices?

Mr. COLVER. Exactly so, and my first statement was that, wittingly or unwittingly, with purpose or without purpose, there is a persistent effort to mix up these three proceedings and to claim for these proceedings ordered by the President or by Congress the procedure which is not applicable to them.

Mr. GATES. You spoke of the proceedings being disorderly. What do you mean by that?

Mr. COLVER. I mean in the sense of not being orderly—not following established practice.

Mr. GOODYKOONTZ. Mr. Commissioner, the only thought that came to me about procedure is that perhaps you might during the initial steps form a conclusion—in other words, prejudge the case; that perhaps your procedure was subject to that objection. That is the thought I had in mind.

Mr. COLVER. To those who make that statement, we can look them in the eye and say honestly that that is not the fact. The commission knows practically nothing—and I think I can use the word nothing—about the detailed procedure of sifting out the chaff from what come before them in these proceedings. We have too many other things to do.

Mr. GOODYKOONTZ. Your counsel and assistants attend to that?

Mr. COLVER. Yes, sir. This is true, and it is naturally true, that as the staff comes to us with its conclusions—and I suppose the members of the staff will not like to hear me say this—they come to a commission naturally prejudiced a bit against their findings for the reason that we can not help but feel that the staff is trying earnestly and honestly, and as we want them to do, to make good their cases, and so we supply the elemnt of doubt. It comes as naturally as it comes to the judge to be doubtful as to his prosecutor, as to whether his prosecutor is trying to get justice or trying to win his case, without any suspicion or disfavor with regard to the prosecutor.

Now, the last thing that I want to say is that the complaint that is most made is, not that we do not hear the respondents before the issuance of complaint, but that we issue the complaint at all. They say, "You are investigating me. If you find anything that will warrant the issuance of a complaint, tell us, and we will stop it." Now, the law says that if we have reason to believe that an unfair method is being practiced, and if it is in the public interest to have it corrected, the commission shall issue its complaint. There is no side door. There is no private office about it at all. Congress did not tell us to run a shop for the dispensing of immunities or to fix things up privately between competitors. They told us that if a wrong was

being done and if it was in the public interest to have it corrected, that we should proceed to correct it, and we do.

Why? If the procession of these 176 cases had come through an office as being cases where not only should the complaint be issued, but where in 153 cases the respondent himself admitted the fault, without any contest at all, if in those 153 cases there had been 153 secret quiet compositions of a business difficulty, what good would the public have gotten from it? We would then be running a bureau for the adjustment of private grievances. A man would come and complain that he was being hurt by his competitor. We would call in his competitor, and try to fix up a deal between them. Where would the public come in on a proceeding of that kind? Nowhere. One hundred and fifty-three times a signboard has been put up for the guidance of business, that a certain line of conduct has been admitted to be bad by the men who practiced it, and other concerns guide themselves by those 153 cases. That is where the public service and the public interest and the service to business comes in.

Mr. MORGAN. Has there been any inclination on the part of a party who has already been before the commission to come before it again on a repetition of the offense?

Mr. COLVER. In some cases there has been a disposition to violate an order to cease and desist. In no case has that disposition flowered so far, as yet, that the respondent has been called before the Federal court for further proceedings. In quite a number of cases it has been found necessary to warn them that they were getting dangerously close to a breach of the injunction, and in every case, I think, it has been corrected.

Now, let us leave the question of procedure. I am sorry that I have taken so much time on it, but this commission can scarcely come before a committee of this kind without feeling that it ought to explain its methods of procedure.

The CHAIRMAN. I do not think the commission needs to come here and defend itself. So far as I know, I do not think it needs any defense.

Mr. STEELE. Members of Congress know something about criticism, too.

The CHAIRMAN. A man who has been accused of a crime never likes the law, we are not surprised to find a little kicking, the very fact that some are kicking indicates that you have been doing something.

Mr. GOODYKOONTZ. Mr. Commissioner, I would like to have a copy of the organic act and a copy of your report, not for the hearing, but for my own private use, if you have them.

Mr. COLVER. I will be glad to furnish them to you. Chairman Murdock yesterday went over rather in detail both the organic act of the Federal Trade Commission and the Clayton law, and suggested certain amendments and changes of phraseology, and one thing and another, which in the opinion of the commission would tend to make a snugger and better fitting job for execution. I have another suggestion to make. There has grown up in this country, and is growing now, an entirely new form of trust, and an entirely new method of destruction of competition. The 1920 model trust is a thing that is entirely outside of any law that Congress has passed. It is beyond the vision of the courts up to the present moment. The

courts do not see it, and Congress has not taken cognizance of it to write a remedy in the books.

Your laws fostering competition and your laws forbidding trusts, as they now stand, provide that a competitor in any line of business, be he producer, manufacturer, or seller, may not interfere with his competitor in the same line of business, or he may not lessen competition by buying out his competitor, or a group of competitors, in the same line of business may not be welded together into a monopoly. The Federal Trade Commission law, the Clayton law, and the Sherman law, all contemplate a contest between manufacturers, producers, or dealers in the same thing as being a satisfying definition of competition. That is not good, to-day. There is another kind of competition now, and another kind of trust, and another kind of monopoly, and if it is met now it will be met in its formative stages, and it is pretty well formed at that, but if it is not met until later it will be pretty well set and crystallized, and a good deal harder to meet. The Standard Oil Co. is an old two-cylinder trust, very much out of date——

The CHAIRMAN. It is very effective, though.

Mr. COLVER. Rebuild the Standard Oil Co. to-day into the 1920 model, and there is no law against it, and you really would have an effective organization. The Standard Oil Co., as a monopoly, and before it was dissolved, sought only to crush out its competitors, buy them out, crush them out, use railroad rebates against them, and otherwise. But the real strangling, unfair competition to-day, and the real creation of trusts and monopolies to-day is not only between competitors in the same articles. It is not only the uniting or the crushing out of dealers or manufacturers by a stronger unit in the same business. It is the uniting of competing commodities in one ownership.

The CHAIRMAN. You mean such as the Shoe Machinery Co.?

Mr. COLVER. No; I mean this: I am going to reconstruct the Standard Oil Co. for you and make it a 1920 model. The Standard Oil Co. takes petroleum as its basis and it breaks petroleum up, generally speaking, without going into the refinements of the process; into gasoline, kerosene, and fuel oil. Now, the Standard Oil Co., in its perfect flower as a trust, saw to it that it was not competed with in, and that it monopolized gasoline, kerosene, and fuel oil, and, of course, petroleum.

If the Standard Oil Co. would get up to date—and there is no law against it on the books—it would analyze its problems something like this. It would say: Gasoline—First control competition or establish a monopoly in gasoline; the first step. Second: What competes with gasoline? Gasoline is principally used as a fuel for internal-combustion engines. Wood alcohol competes. We will now control the production and manufacture and distribution of wood alcohol. Kerosene—In the first place let us control the production and manufacture and sale of kerosene. Now, what is its principal use? Its principal use is as an illuminant. What other illuminants are there? Principally electricity and gaslight. All right. Let us control the production, manufacture, and distribution of electricity for lighting purposes and gas for lighting purposes. Being in electricity for lighting purposes, why not take in power? It is a competitor with gasoline also in the internal-combustion engine. So we will control electricity in its production, manufacture, and distribution for power purposes. Well, since we have gone that far, why not control the manufacture of electric machinery and gas engines? Control it and put everybody else out of it? Going on down to fuel oil, let us control the manufacture, sale, and distribution of fuel oil. What is its use? It is used for a substitute for coal very largely at sea, and to a less degree in such operations as paper mills and other large operations, especially those near the oil fields. It is steam-making fuel. We will control the fuel oil and naturally in order to make our position secure we should control all of the coal; and with the coal goes the coke. That is the real 1920 trust. That is the trust that you have right now. That is the trust that is sprouting up all over the country. It has not got together yet in many places, but it has in some. It is coming, unless it is stopped, just as sure as to-morrow is Wednesday; and the sooner it is met the less crystallized condition will have to be faced by the lawmakers and the less disturbance of business will result if the remedy is applied before business comes to think that this sort of thing is necessary for it.

Mr. IGOE. How many combinations of that sort are in process of formation now that you have any knowledge of?

Mr. COLVER. Well, there is a classic one and that is the meat-packing business, where you start out and disassemble a steer into its component parts and the by-products, a proper thing, and where, having found that you get a product called oleomargarine, which is a competitor of butter and a substitute for it, the butter business is integrated with the disassembling of the steer business, and where, having found in disassembling a hog you get a product called lard and that cottonseed yields a substitute for lard, and one of the by-products can be used for fertilizer and therefore the abattoir furnishes fertilizer products, and because cotton seed furnishes a substitute for lard you get into the cottonseed-oil business. You will find the ramifications have gone so far that in that particular concern there are grouped together unrelated but competing articles that go up to the scores.

Mr. IGOE. Is there any other concern besides the packing industry that is developing in that way?

Mr. COLVER. Oh, yes. When we had sugar from the cane and beet sugar came into existence, the cane sugar was practically in one hand and that hand has reached out to beet sugar which was a substitute for and a competing commodity with cane sugar.

Mr. GOODYKOONTZ. Did your board deal with the sugar business?

Mr. COLVER. With the sugar business?

Mr. GOODYKOONTZ. I have had more complaints about sugar than almost any other product. They have had no sugar to preserve fruits or berries all over the country, because there is no sugar to be had.

Mr. COLVER. Oh, if you ask me if the commission has any power or authority to deal with the present disgraceful conditions in sugar, I will answer you no. At a time when the country needs every bit of food it can have, at a time when the canning concerns are putting up their biggest pack in history, at a time when they could have sugar, at a time when sugar is sent abroad in unlimited quantities, at a time when sugar is stored in quantities, they deal out to the housewife,

vithout authority, 2 pounds of sugar at a purchase, when even in the nidst of the war they gave her 25 pounds for preserving purposes. These housewives are going to have their shelves bare of preserves for the winter and will have to go to the stores and buy fruits put up by the canning concerns.

Mr. CURRIE. Who issued the order about 2 pounds of sugar per person?

Mr. COLVER. I do not know. I think it could be found but it is none of my business.

Mr. IGOE. Has the Senate asked the commission to investigate that question?

Mr. COLVER. No, sir.

Mr. CURRIE. I am very much interested in your statement. You mentioned the meat packers. If it is a fair question, let me ask you if the Dupont people come within the same category in reaching out and controlling some industries. I was wondering whether it was a question of controlling associated industries or just general in the way of industries?

Mr. COLVER. Yes, that is interesting in so far as dynamite and nitroglycerine compete with powder; they have started out with one explosive and added competing explosives. The tendency is there but I would not say that is a combination of the kind I have mentioned. I do not think their dye industry would be either.

Mr. CURRIE. Is not the dye industry related to the manufacture of explosives?

Mr. COLVER. I do not know about that.

Mr. CURRIE. I know that all the intermediates are connected with the explosive industry. I was wondering what the Dupont's position was on that question.

Mr. COLVER. You are better informed as to that, than I.

Mr. IGOE. These concerns follow what might have been called by-products and endeavor to control the entire line of business that handles the by-products of their principal business?

Mr. COLVER. No; they endeavor to control the things that compete with their by-products and their main products. Of course, they control their own by-products, but when the by-products come in competition with something else they seek to control the competing article.

Mr. IGOE. They control competition with their by-products?

Mr. COLVER. Yes, sir.

Mr. IGOE. And monopolize that business?

Mr. COLVER. Yes, sir; so that, to combat this modern trust, I submit that section 4 of the Federal Trade Commission act and section 1 of the Clayton act—in each case those are the sections of definition—should have added to them a paragraph reading as follows:

> Competition includes within its meaning trade or dealings in a commodity with relation to trade or dealings in another commodity which actually is or may be sold, purchased, or used as a substitute for such commodity and also trade and dealings in one branch or stage of a line of commerce which affects the trade or dealings in another branch or stage of any line of commerce which competes therewith.

Mr. IGOE. Have you had any particular case which made this amendment necessary? I would like to get some concrete case if you have one.

Mr. COLVER. Yes, sir; there are about 25 cases which came before the commission at the same time, within a week or so, where several large concerns dealing in oleomargarine and meat and meat products in various parts of the country, from Massachusetts, I think, to Wisconsin on the West and as far South as Florida, about the same time, relatively at the same moment, speaking generally, descended with a plan to absorb butter making and cheese making outfits in strategic points.

Now, clearly that had relation to the oleomargarine business of these people. The only way that the Federal Trade Commission can reach that now is by making it come under section 7 of the Clayton Law and then there must be a sale, a purchase, of stock, first establishing that this firm in the oleomargarine business is a competitor in butter making. We establish that because they have other butter making and cheese making concerns. You see they get the first start without breaking any law. Well, then, we first establish that they are competitors in the second article. Then establish that the transaction involved a purchase of stock; that the stock so purchased was used to lessen competition or to create a monopoly. It is a most difficult proceeding, a proceeding which the spirit of the law calls for—and we are trying to carry out the spirit of the law—much more than the letter calls for.

This amendment would also straighten out what Mr. Murdock suggested yesterday, the difficulty which occurs when unfair practice runs in different stages, when it can be denied that the manufacturer is in competition with the wholesaler even in the same commodity; when it can be denied that the manufacturer's selling agent or selling department is in competition with the jobber, where they claim that they are not in competition because they are on different planes. This is meant to wipe out the attempted defense of different planes. It is a suggested amendment to the Clayton law and the Federal Trade Commission law, which I think will be useful and will be in the public interest and will work no hardship on legitimate business.

Mr. STEELE. Mr. Colver, have you finished that branch of your argument?

Mr. COLVER. Yes, sir.

Mr. STEELE. I do not want to interrupt the thread of your argument. Under the Federal Trade Commission act the jurisdiction of the commission seems to be limited specially to unfair competition or unfair practices, but in section 7 it is given certain authority to act as a master in proceedings under the antitrust act. Now, from your argument here I infer that the work of the commission in the direction of the suppression of unfair practices has been beneficial to the public.

Mr. MURDOCK. Mr. Steele, if I may interrupt there, if we had the words as you give them, "unfair practices," we would have a much broader law than we have as it is. We have the words in the law, "unfair methods of competition in commerce."

Mr. IGOE. You use the words "unfair acts," I believe, in your amendment.

Mr. MURDOCK. Yes, sir.

Mr. STEELE. That is about the same as unfair practices. What I was about to ask you is whether or not in your experience as a member of the Federal Trade Commission with reference to many of the

things that are forbidden by the antitrust act of 1890, if the jurisdiction were given the Federal Trade Commission in an administrative way with reference to these questions, whether that would help along the business interests of the country in knowing just what they could do and could not do. What I have in mind is this: Under the decisions of the Supreme Court, particularly in the Standard Oil and tobacco cases, they practically held that every case under the antitrust act must depend upon its own particular facts. There is a certain outside boundary there that they give, but they do not give any precise definition, so that no lawyer in the country can with any degree of certainty advise his clients as to what does or does not constitute an offense under the antitrust act. Now, it is that uncertainty more than anything else, it seems to me, that has given rise to a great deal of the objection to the antitrust act, because nobody can define a monopoly, nobody can define an unlawful restraint of trade, or the things that are condemned, but it is the uncertainty of knowing what can be done and what can not be done. Therefore, I am asking you, as a member of the Federal Trade Commission, from your own experience, whether the procedure which is outlined in the bill, H. R. 1186, which I introduced sometime ago, would be in your judgment beneficial to the business interests of the country?

Mr. COLVER. I am familiar with that bill, Mr. Steele, and, speaking for myself, I have been a partisan of that bill ever since I first saw it. I think you introduced it in the last Congress.

Mr. STEELE. Yes. Do not hesitate to criticise any parts of it, Mr. Colver, or make any suggestions, because I have no pride of opinion. It is only the result that I am interested in.

Mr. COLVER. I will have to speak without reading the bill, and I will not stop to read it now, because I have read it so many times that I think I have its provisions pretty well in mind. I would like to start a little way back and get a running start on this bill. It is said that the Federal Trade Commission should, instead of proceeding against business, advise business; that if a business man comes before the Federal Trade Commission and says, "I propose to do so and so; is it all right?" it is a mighty mean Federal Trade Commission that will say, "We can not tell," and then later haul him in or see him fall under the sword of the Department of Justice for doing the thing. Then he could fairly complain and say, "I told you all about it in the beginning."

But Mr. Steele has said very truly that no lawyer can advise what is and what is not in contravention of the law. If the Roots, Choates, and Wickershams, and all the rest of them can not advise what is or what is not lawful in advance, how in the world can you expect the Federal Trade Commission to give such advice? Mr. Steele's bill, as I understand it, contemplates this, and this only: No business concern is compelled to take the benefit of the law which he proposes to enact. It is purely a voluntary thing. Under it a business concern being about to embark in a certain line of conduct—and I want to tell you that a man can not possibly tell another man what he is going to do; he can tell what he thinks he is going to do; the man does not live who himself knows what he is going to do tomorrow or next week—but a business concern, being about to embark on a general business program, comes to the Federal Trade Commission and says, not, "Is this lawful? Will you guarantee that

I will not get tangled up with the law if I do this thing?" No. A business concern comes in and lays down its proposed line of conduct, and says, "I want a license to do that." Now, he takes out a license and the Federal Trade Commission says, "All right; you go ahead and try it. In the meantime, in order to safeguard that, you tell us, or make public not what you are going to do, but, currently, what you are doing and what have you done, and if those acts done or being done appear at any time to come skirting pretty close to a breach of any of the laws of the land, you will not be ordered to stop it; the Federal Trade Commission will not set itself up as your judge, but you will be told that you are getting dangerously close to the line, and if you want to continue that line of conduct you had better go out and take your chances under the law, because the license is not going to be extended any further; it is going to be withdrawn."

So long as the business concern has the license it has a bar in any action under any law of the United States looking toward the control of trusts and monopolies and fostering of competition.

So that, in a sentence, a business concern in doubt about the legality and feasability of a proposed line of conduct, comes to a Government office and says, "Frankly I do not know whether this is lawful or not. I will try it."

The Government says, "Go ahead and try it. If anybody complains, if anybody is heard to say that he is hurt, we will tell you. So long as nobody complains, so long as nobody is hurt, keep on. The moment anybody is hurt or justly complains you will have to go out from under the protection of this license and take your chances with the law. Now, when you go out or the license is revoked, you are only put back in the same position that you were when you applied for the license. You came in voluntarily, you undertook to guarantee that your proposed conduct would be lawful or that you would amend it so that it would be lawful, and if you do not keep that guarantee you would lose your protection and go out and take your chances with the law."

That is just about as near as one can get to advising or ruling in advance on anybody's conduct. I think it could be worked, Mr. Chairman.

Mr. STEELE. Since the introduction of this bill I find that some years ago the Senate Committee on Commerce, of which Senator Cummins was chairman, made a recommendation to the Senate somewhat along this line. It was some years ago that that recommendation was made, the theory being this, as I had in mind when I prepared this bill, that in order to remove the uncertainty that existed as to what can be or what can not be done, a business man might come before your commission and lay all his cards on the table and say, "I propose to do thus and so. If in the judgment of the commission that is a lawful procedure, then I ask for a license to do interstate commerce and that will act as an immunity from any proceeding under the Interstate Commerce act and that acts as a license from the commission with the privilege of revoking it."

Mr. COLVER. Making his subsequent acts amenable to the law?

Mr. STEELE. Exactly so. It would remove the doubt and uncertainty that now exists as to the application, and there would be a Federal agency that would pass upon it and give him a clean bill of health at the time he makes his application. The only thought that

occurred to me since the passage of that bill is a further modification that the Attorney General might possibly be given the right to ask that the judgment of the commission be passed upon by the Circuit Court of Appeals.

Mr. COLVER. That would safeguard it, but immediately you put that in you will probably find that another provision would be wanted to be inserted that if revocation of the license was contemplated it could not be revoked without an appeal, and I think that would be bad. If a man has a thing that is his, if he has a vested interest in it, you should not take it away without due process of law. If a man comes in and says, "I want to be preferred against my fellows; I want to have an immunity that they have not and in return for it I will not abuse it," and if, having abused it, it is taken away, you are not taking any property away from him. Anyhow he gets his day in court for when he goes out into the world without his license he immediately finds himself in conflict with the anti-trust law, and when he gets into court on a charge of violating that law, he has his review as to the wisdom of the commission in suspending his license, because the same state of facts exist in that case.

Mr. STEELE. Have you any other suggestions to make as to the improvement of the bill?

Mr. COLVER. No, sir. I think the matter in regard to the Attorney General might very well go in if it did not result in bringing in the other matter.

There is one other thing I would like to bring to the attention of the committee, and I am going to ask permission to file later a suggested form of legislation.

I want to call your attention to a device that is coming into use in this country, and I think the Judiciary Committee is as good a place to display it as any, although a good place for it is the Ways and Means Committee. Here is a thing called a "bearer warrant." [Exhibiting a paper, drawing of which appears on page 47.]

There is a device which, when it comes into common use in this country, will defeat every trust law, every attempt to prevent amalgamation of corporations, interownerships, interalliances of competing corporations; will defeat any income tax law that you ever drew or can draw; it will defeat your revenues and it will defeat your efforts to control trusts and monopolies and unlawful conspiracies in restraint of trade.

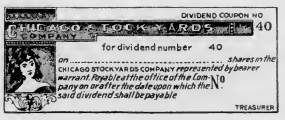
This particular one is intended to represent the stock in a corporation incorporated in Maine and with offices in Boston, which owned the stock of a corporation incorporated in New Jersey, which in turn owned the stock of a corporation incorporated in Illinois. When the stock of this corporation was issued three shares were given, and endorsed back immediately in blank, to three $1,200 a year clerks in a corporation trust company in Portland, Me. They became the officers of this company. All the rest of the stock was issued to the treasurer of the company, who himself had nothing to do with the company or its business, but was an employee of the corporation trust company up in Maine which handled the incorporation and had the necessary ostensible principle place of business which we used to see around Jersey City, but not so much now.

The treasurer of this company testified under oath that he does not know a single actual stockholder of this company and that he

* for form and detail of Coupons see below

40 (Coupon)	39	38	37	36 (Coupon)
35	34	33	32	31
30	29	28	27	26
25	24	23 (Coupon)	22	21
20	19	18	17	16
15	14	13	12	11
10	9	8	7	6
5 (Coupon)	4	3	2	1 (Coupon)

*



never did know one, and there is no way that he ever could know one; that, of record, he himself has all but three shares of this corporation's stock, $8,000,000, controlling overlying corporations aggregating probably $50,000,000. He does not know, nobody knows, who owns that company to-day. When dividend day comes a dividend check is written for the entire capitalization by the treasurer to his own account. It is deposited by him in a bank in a special dividend account.

Mr. STEELE. I see this certificate certifies that the bearer is entitled to so many shares of fully paid stock, and then there are coupons for dividends attached. How about the certificate of his ownership of stock? Does this entitle him to those shares of stock if he chooses to exercise his right?

Mr. COLVER. Oh, Yes. I will read you the by-law on that subject.

Mr. STEELE. I would like to have that in the record.

Mr. COLVER. Yes; I am very anxious to have it in the record. I would like to have it in the record before several committees up here. As I was saying, when a dividend is about to be paid the treasurer of the company draws his check as treasurer payable to himself as trustee for all this stock and for the entire dividend. Then that is deposited by him in a bank in a special dividend account. Then John Smith, owning a share of stock evidenced by this bearer warrant goes to any bank in the United States, knowing that dividend day has dividend, and cuts off coupon No. 1 and puts it in bank for collection. He does not know how much it is worth——

Mr. IGOE. It is a blank dividend?

Mr. COLVER. Yes. He does not know how much it is worth; the bank does not know how much it is worth; but presently it reaches the bank where the special dividend account is, and a cashier's check can be drawn or a man can walk up to the window and present it without indorsement and get currency, or he can send his chauffeur or a bootblack and collect it in that way. These coupons being all added together clear or satisfy that special dividend account and the transaction is ended. The treasurer does not know who got the dividend; the directors do not know; the bank does not know; the corporation does not know; none of its officers knows.

Now, if you, Mr. Chairman, owned one of those certificates for 100 shares and I owned another and Mr. Rockefeller owned another and we came to make out our income tax returns and we were not as careful as we all three are, you would find no way for the Government to check up, because if the dividend checks represented $1,000 to me and to you and to Mr. Rockefeller, the internal-revenue officer would not know whether to apply the normal tax rate or the tax rate for a $50,000 income or the tax rate for a $5,000,000 income or the tax rate for a $50,000,000 income. So that your revenue laws are absolutely defeated in so far as personal income tax is concerned, potentially.

And again, what legitimate purpose is served by a device like that? What legitimate business use can there be for such a thing as that? I would as soon except to see a man carrying a dark lantern and a jimmy as carrying a thing like that around claiming it was necessary for the prosecution of his business.

Stock has two rights, as I take it. It has the right to vote and it has the right to receive dividends. I have shown you how the stock

can get its dividends without the disclosure of the identity of its owner. Now, I will show you how it can vote, and it can absolutely vote at any special or regular meeting and you have not the slightest idea who voted.

This is the way it is done. The concern, we will say, has its main office in Boston. Suppose you were a resident of Washington and had one of those certificates. Let us say you had 51 per cent of the stock. You have 51 per cent of the stock and you want to elect certain directors and the executive committee and the officers. You want to control the conduct of that corporation and you do not want your identity known.

Well, you live in Washington. A coupon big enough to represent that holding of 51 per cent would attract attention. First I suppose you would have that broken up into a number of smaller bearer warrants, that is what I would do if I were trying to hide—so small that the coupon would not be of large enough amount to attract attention.

Now, let us vote and collect your dividends at the same time—make it a good job. You live in Washington. You take your automobile. You start out. You stop at the smallest town, the most obscure town that you can find in Virginia, off a railroad, if you could find such a one that has a bank in it or a trust company in it. You cut off your coupon and deposit it there—no; do not do that. That is altogether too obvious. You give your coupon and this document to the chauffeur and tell the chauffeur to give it to a boy in the street and have him go around to the bank and transact your business.

This is what he would do. He would cut off the coupon and deposit it with any direction you wanted him to give as to where the remittance was to be made. It could be sent in from Roanoke and the remittance could be made in Keokuk. It could be made to a post-office lock box. Then the boy would hand this warrant to the cashier and show the cashier section 25 which is written on the back of it. He would hand him the warrant and, pursuant to the direction on the back of the warrant, the cashier or other officer of the bank would give him a receipt showing that this paper had been deposited in the bank and agreeing that it would not be surrendered by the bank before a certain day, that day being beyond the date of the annual and special meeting.

You now have your dividend arranged for and a certificate from a bank showing that that bearer warrant is so locked up that is can not be voted again until after a given date. The bank's receipt does not run to anybody. It simply certifies the location of the piece of paper. Then you go to the next town and deposit another section of your holdings, and so on. Or take the train and go to San Diego and do your business in southern California. Anywhere in the country, in big or little cities and towns—anywhere you can find a bank—this transaction can be gone through.

You then mail your bank receipts to Boston. Then why not employ a Boston attorney to finish the job for you, or have a $1,200 a year man from Maine do the business for you? You would not have to sign your name, because the bank certificate would be evidence of your authority. The annual meeting is held, and your stock is

voted while the dividend can come to any addresss that you want—to your cook or chauffeur or to somebody else's cook, if you want to—all you have to do to get your warrant back is to put your receipt into the bank after the date agreed upon. At no time has your identity been disclosed; at no time have you been compelled to do a single overt thing in the whole transaction.

Mr. IGOE. You vote on the main certificate?

Mr. COLVER. You vote on the bank's receipt for the warrant. The bank's receipt being an earnest that that particular document will not be voted twice, it is a safeguard against repeating, all of which is accomplished by article 25 which is printed upon the back of this document and which I will read:

ART. 25. Warrants for shares to bear.

(1) The company may, upon the delivery to it of the certificates for any fully paid up share or shares with a transfer thereof to the company, issue for the share or shares therein specified a warrant or warrants entitling the bearer to such share or shares and providing by coupons or otherwise for the payment of the future dividends on such share or shares.

(2) The shares specified in the certificate so delivered up shall from time to time be transferred to the company as agent for share warrants and deposited with the registrar of share warrants and shall not afterwards be transferred, and no certificate shall be issued therefor except in accordance with the provisions hereof.

(3) The warrants shall be under the common seal of the company and shall be signed by the president or a vice president and by the secretary or assistant secretary or some other person appointed in place of the secretary by the directors. The dividend coupons attached to the warrants shall bear the facsimile signature of the treasurer of the company which may be adopted and used by the company notwithstanding that such person may have ceased to be treasurer at the time such coupons are issued.

I must break in and call your attention to that. The document is made valid by the facsimile printed signature of the treasurer—who is the trustee—even though he is no longer treasurer, so that you have not only lost the identity of your stockholders but there is the device for losing the identity of the treasurer who holds the stock of the whole company, because the signature that validates is not necessarily the signature of the man who holds.

Mr. IGOE. What was the reason given for this device? Was there any reason given for it?

Mr. MURDOCK. I know of no reason that has ever been given.

Mr. COLVER. I do not remember that any reason was ever given except that it was "useful."

Mr. IGOE. Did they explain in what way it was useful? What public reason was given for its usefulness?

Mr. COLVER. The public explanation of the thing, so far as we can get it, was a blanket condemnation of the commission for fishing around in things that were none of its business; that these were private transactions and that people had a right to run their business as they chose. That is as near an explanation as I ever got.

Mr. MURDOCK. Mr. Colver, I suggest that you advise the committee that the device of the bearer warrant and the place where we discovered it and the relations it has to other business, can be found in chapter 5, part 3, of the commission's report on the Meat Packing Industry, a very interesting chapter.

Mr. COLVER. I would like very much to send that volume, with the place marked, to any of you gentlemen who will help my memory by dropping me a line about it. You will find it a most interesting

chapter. Article 25 goes on, reading back a little to get the connection:

The dividend coupons attached to the warrants shall bear the facsimile signature of the treasurer of the company which may be adopted and used by the company notwithstanding that such person may have ceased to be treasurer at the time such coupons are issued. When all of the coupons attached to any warrant shall have been paid a new sheet of coupons will be attached to the warrant upon presentation thereof to the company.

When they are all used up you get a new sheet.

(4) If any warrant or coupon shall be worn out or defaced the directors may on surrender thereof issue a new one in its place.

(5) The directors may, upon proof to their satisfaction of the loss or destruction of any warrant or coupon and upon such indemnity being given to the company as they shall deem adequate, issue another warrant or coupon in its place.

(6) The company shall be entitled to recognize the bearer of any warrant or coupon as absolutely entitled to the share or shares or dividend therein specified.

(7) The bearer of a warrant may deposit the warrant at the office of the company or at any bank or trust company—

When I said it could be done anywhere in the United States I did a gross injustice. It is not limited to the United States. Presumably it is limited to this earth.

(7) The bearer of a warrant may deposit the warrant at the office of the company or at any bank or trust company not less than three days before any meeting of the company and the company or the bank or trust company may issue to the depositor a deposit receipt and a voting certificate in such form as the board of directors shall provide. The voting certificate shall entitle the depositor to attend and vote and exercise the rights of a member at such meeting in respect of the share or shares for which the warraut or warrants have been so deposited and to receive at or prior to the meeting such proxy or instrument as may be necessary to enable him so to do and after the meeting the warrant or warrants shall be returned to the bearer of the deposit receipt under surrender thereof. And in respect of all shares specified in any warrants that shall not have been so deposited the treasurer shall attend and vote and exercise the rights of a member in such manner as he and the president of the company shall agree.

The voting power, then, is in the treasurer for this entire stock issue unless proxy is exercised against him.

Mr. IGOE. That is, unless the bearer warrants are presented?

Mr. COLVER. Yes, sir; the warrants or the bank certificates.

Mr. IGOE. If the warrants are not presented, the treasurer has the voting power for the remainder of the stock?

Mr. COLVER. Exactly so.

Mr. IGOE. I have been trying to figure it out. Ordinarily a stock certificate might be transferred in blank, but under this arrangement it would not be necessary to transfer them in order to receive the dividends. The holder of the dividend certificate would not disclose his identity. Of course, with this blanket voting power, the actual holder of the stock might for some reason conceal his identity, but it seems to be a sort of combination of the trustee's certificate of stock holdings with the coupon feature of an ordinary corporation bond attached, only instead of it being for a specified dividend it is for the amount of the dividend declared.

Mr. COLVER. Article 25 continues:

(8) If the bearer of a warrant shall surrender it together with the unmatured coupons thereto belonging and request in such form as the directors prescribe that he be registered as a stockholder or member in respect of the share or shares specified in it the company shall transfer into his name the share or shares specified in the certificate of shares originally delivered up in respect of which said warrant was issued and shall issue a new certificate therefor. The registrar of share warrants shall transfer from

time to time shares deposited with it as aforesaid in such manner as may be necessary to give effect to the foregoing provisions. And all transfer agents and registrars of the company shall be relieved from all liability in respect of such transfers.

(9) The company shall appoint a registrar of share warrants who shall countersign and register all warrants before they are issued and no warrant shall be valid unless so countersigned and registered.

(10) The company may appoint agents in Boston or elsewhere with full power and authority to do all things that may be necessary to carry out and give effect to the foregoing provisions respecting the share warrants and to vest in the holders of such warrants the rights and interests specified herein.

Mr. IGOE. If it became important for the commission or any Government agency to know who were the stockholders in this concern, it would be utterly impossible for the treasurer to tell you who owned the stock. Is that what you found in this particular case?

Mr. COLVER. It would be absolutely impossible so far as this device is concerned. It might be, as in this case, that the transaction could be found at the other end and traced back. That is to say, a dividend check could be found at the other end and a memorandum found which identified the dividend check which would lead back to this company.

Mr. IGOE. So far as the treasurer of the corporation is concerned he could truthfully say that he did not know?

Mr. COLVER. Oh, absolutely. And, so far as the treasurer of the company is concerned, we do not know, you do not know, there is no reason for anybody to know who he is.

Mr. STEELE. He might have transferred the coupons.

Mr. COLVER. Yes, sir; because the coupon does not have to be indorsed to collect it. It is payable to bearer.

Now, article 25, entitled "Warrants for shares to bearer," which I have just read, is printed on the back of a document the wording of which is as follows:

Incorporated under the laws of Maine. Chicago Stockyards Company. No. ——. Shares ——. Warrant to bearer. This is to certify that the bearer of this warrant is entitled to —— fully paid up shares in the Chicago Stockyards Co. upon demand, and meanwhile to receive all dividends declared upon the said shares and to exercise the voting powers in respect thereof under and subject to the provisions of article 25 of the by-laws of the company, a copy of which is indorsed hereon.

The CHAIRMAN. That is the copy that you have just read?

Mr. COLVER. Yes.

In witness whereof the Chicago Stockyards Co. has caused this warrant to be signed by its president or vice president and secretary or assistant secretary this —— day of ——.

The CHAIRMAN. Attached to that are a number of coupons?

Mr. COLVER. Yes. On the end of it is printed:

Countersigned and registered by State Street Trust Co., registrar. ——, *Assistant Treasurer.*

At the bottom of it:

——, *President.*

On the other side:

——, *Secretary.*

Part of the same paper are 40 coupons numbered from 1 to 40 consecutively, each coupon reading as follows:

Dividend coupon No. 1 (to 40). Chicago Stockyards Co. For dividend No. 1 (to 40) on —— shares in the Chicago Stockyards Co., represented by bearer warrant, payable at the office of the company on or after the date upon which the said dividend shall be payable.

F. R. PEGRAM, *Treasurer.*

The CHAIRMAN. If you can suspend at this point we will take a recess.

Mr. COLVER. I can conclude now if you allow me to say only this: That this is cited to you only as an example. I should like to furnish for the record a suggested form of legislation to meet this situation.

The CHAIRMAN. We will be glad to have you do so.

[The suggested form of legislation referred to was later supplied and is as follows:]

ADDITIONAL PARAGRAPHS TO SECTION 7, OF THE ACT TO SUPPLEMENT EXISTING LAWS AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, AND FOR OTHER PURPOSES.

[Clayton Act; approved Oct. 15, 1914.]

(a) Any officer of any corporation engaged in commerce or of any corporation owning or holding the stock of a corporation engaged in commerce, who shall pay or cause to be paid any dividend, or shall draw or deliver, or cause to be drawn and delivered, any dividend, or shall draw or deliver, or cause to be drawn or deliver, any dividend, check, coupon, or warrant to any stockholder of record unless said stockholder shall have filed with the secretary of the corporation within fifteen days prior to the payment of such dividend, a statement in writing showing the name and address of the true beneficiary, owner, or owners of the stock of record in his name, and, if such stock is pledged as collateral for loan, setting forth the name an address of the person to whom such loan is payable, shall be deemed to be, and is hereby, declared to be guilty of an offense against the United States.

(b) Any officer of any corporation engaged in commerce or of any corporation owning or holding the sotkcof a corporation engaged in commerce, who shall at any regular or special meeting of stockholders receive or record the vote, or cause to be received or recorded, the vote of any stockholder of record, whether offered to be cast in person or by proxy unless the stockholder of record shall have filed with the secretary of the corporation a statement in writing, as hereinbefore provided, in the case of payment of dividends within fifteen days prior to the date of such regular or special meeting of stockholders, shall be deemed to be, and is hereby, declared to be guilty of an offense against the United States.

(c) Any stockholder of record of any corporation engaged in commerce or of any corporation owning or holding the stock of a corporation engaged in commerce, who shall file or cause to be filed any statement as hereinbefore provided which is untrue in any respect, shall be deemed to be and is hereby declared to be guilty of an offence against the United States.

(d) Any stockholder of record who shall receive any dividend or dividend check or any warrant or other evidence for securing the payment of a dividend, regular or special, unless he shall have filed with the secretary of the corporation a statement as hereinbefore provided, shall be deemed to be and is hereby declared to be guilty of an offense against the United States: *Provided*, That any stockholder of record who shall upon receipt of any dividend or any check, warrant, or other evidence of ownership of such dividend, may purge himself if he shall return by registered mail such dividend, check, warrant, or other evidence of ownership of such dividend, to the secretary of the corporation within ten days of the receipt thereof, together with the statement of true beneficial ownership as hereinbefore provided: *And provided further*, That any stockholder of record of any corporation engaged in commerce or of any corporation owning or holding the stock of a corporation engaged in commerce, may receive and the proper officers of such corporation may pay, any dividend withheld under the provisions hereof upon the filing by the stockholder of record and the receipt by the officers of such corporation such statement of true beneficiary ownership as is hereinbefore provided.

(e) Any stockholder of record of any corporation engaged in commerce or of any corporation owning or holding the stock of a corporation engaged in commerce who shall vote or attempt to vote in person or by proxy at any regular or special meeting of such corporation unless he shall have filed with the secretary of the corporation statement in writing of the true beneficiary ownership of the stock, as hereinbefore provided, standing in his name within fifteen days prior to the date set for such regular or special meeting of stockholders shall be deemed to be and is hereby declared to be guilty of an offense against the United States.

(f) If any stockholder of record in any corporation engaged in commerce or any corporation owning or holding the stock of a corporation engaged in commerce, shall itself be a corporation, partnership, or association, then its president or proper representative shall be required to file the statements hereinbefore provided and any

penalty that would attach to a natural person as a stockholder of record hereunder by reason of the filing of a false statement of true ownership prior to the receipt of dividend or evidence of the ownership of dividend as hereinbefore provided, or exercising the stockholder's right to vote shall attach to such president or representative of such corporation, association, or partnership personally in the event of his filing false statement, or failure to file statement as hereinbefore provided, shall be guilty of an offense against the United States.

(g) Any officer of any corporation engaged in commerce or of any corporation owning or holding the stock of a corporation engaged in commerce, who shall issue or cause to be issued any stock warrant or any other evidence of stock ownership unless it sets out the name of the owner of record of such stock, the ownership of which is so evidenced, shall be deemed to be and is hereby declared to be guilty of an offense against the United States.

(h) Any trustee of any stock in any corporation engaged in commerce or any corporation holding the stock of any corporation engaged in commerce, who shall issue or cause to be issued any stock-warrant, receipt, certificate, or other evidence of stock ownership unless it shall set out the name of the owner of such stock ownership and which is so evidence, shall be deemed to be and is hereby declared to be guilty of an offense against the United States.

(i) The secretary of any corporation engaged in commerce or of any corporation holding for itself or as trustee or in any fiduciary capacity any stock of any corporation engaged in commerce or of any corporation owning or holding the stock of a corporation engaged in commerce, shall keep a book of record of the corporation showing the stockholders of record and the true beneficiary owner of the stock standing in the name of each stockholder of record and shall enter in such book of such record as of the date of each regular or special meeting of stockholders and as of the date of payment of each regular or special dividend, and if such secretary fail to keep such record in the manner hereinbefore provided, he shall be deemed to be and is hereby declared to be guilty of an offense against the United States:

(j) The secretary of every corporation included under the provisions hereof shall safely keep in a place or in a book especially provided therefor, originals of all statements filed hereunder, and any person who shall mutilate, alter, destroy, or by any means falsify any such statements, shall be guilty of an offense against the United States.

(k) In every case herein wherein the commission or any act or the failure to commit an act is declared to be an offense against the United States, the person so declared to have committed an act against the United States, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to imprisonment for a term of not more than three years.

(l) It shall be unlawful for any stockholder of record in any corporation engaged in commerce or any corporation owning or holding the stock of any corporation engaged in commerce to qualify as a stockholder for the purpose of acting as an officer or director of such corporation unless he shall be the true beneficiary owner of the stock standing in his name.

(m) Any person, partnership, or corporation which is disclosed as the true beneficial owner of any stock in any corporation coming under the provisions hereof, shall be required to file with the secretary of the corporation whose stock he owns the statements hereinbefore required to be filed by stockholders of record under all the conditions and with the penalties hereinbefore provided.

(n) It is hereby declared unlawful for any person, partnership, association, or corporation engaged in the production, manufacture, distribution of or dealing in any commodity or commodities, or any partner, member, or stockholder of such partnership, association, or corporation, or any owner of a beneficial interest therein to own or hold any interest in any partnership, association, or corporation engaged in commerce which produces, manufactures, distributes, or deals in the same commodity or engages in the same line of business or which produces, manufactures, distributes or deals in any article of commerce used or sold in competition with or as a substitute for such commodity, or engages in a competing line of business, and any person who shall for himself, or as an officer, representative, or agent who shall violate this provision shall be deemed to be and is hereby declared to be guilty of an offense against the United States, as hereinbefore provided, and shall be subject to the procedure and penalty hereinbefore provided.

Thereupon, at 12.50 p. m., the committee took a recess until 2.30 p. m.

AFTER RECESS.

The committee reconvened, pursuant to the taking of the recess, at 2.30 o'clock p. m.

The CHAIRMAN. Mr. Thompson, you may proceed.

STATEMENT OF HON. HUSTON THOMPSON, COMMISSIONER, FEDERAL TRADE COMMISSION.

Mr. THOMPSON. Mr. Chairman, and gentlemen of the committee, I feel somewhat in the position of our trench rakers during the late war. You will recall that one line of troops would climb out of its trench, pass over to the enemys' first trench, and, if successful in taking it, would pass on to the next, and so on, being followed by a similar line of troops until there came along the trench rakers. They were the ones who were left to make the final clean-up.

Mr. STEELE. And you found a lot of poison gas?

Mr. THOMPSON. Yes, indeed. My associates have covered the subject under discussion very fully except in reference to several matters which they have left to me to discuss. I might say that I have been in the commission for about eight months. I came there after having been in the courts, particularly the Supreme Court, for a good many years—for six years—trying the Government's cases. And so I came when the practice had, in a sense, crystallized. For a time I doubted whether we had the proper system of procedure. But after having gotten into the Federal Trade Commission act, and under it, so to speak, I became impressed with one thing in particular, and that is that we are especially (and putting the emphasis here) an administrative body and not a judicial body.

We are in a sense quasi legislative, in that Congress set forth a definition of unfair trade for us and within the boundaries of which we must stay. Congress in doing so performed a static act. We are the dynamic force behind the act. In other words, we put into action the order which Congress has set forth for us. In a sense we are quasi judicial—in form only. We do not enter a judgment; we have no powers of execution; we simply issue an order to cease and desist. The respondent after completing his case before us has not had his day in court. I am saying this all by way of preliminary to the presentation of the "blue-sky" question, and also by way of suggesting an addition to our act which will give us the right to enforce that act automatically upon the issuance of an order. When a case is presented to us, and the complaint is issued and the respondent answers, then we throw our cards on the table. This is a point that was not emphasized by the other two commissioners. In other words, we have to present our case first. We lay before the respondent all our evidence. He has full and ample time in which to reply. It is not necessary, therefore, that he should know who may have complained against him. Frequently the name is revealed to the respondent in the course of the hearing, after the complaint is submitted to him, as to who the complaining party is. Sometimes it is not. But we say that the knowledge of the individual complaining is a matter of indifference, because the respondent has the issue before him, to which he can reply, with nothing concealed whatsoever.

The CHAIRMAN. Have you any special power over "blue-sky" practices?

Mr. THOMPSON. Have we any?

The CHAIRMAN. Yes.

Mr. THOMPSON. Yes, sir; I think we have. That is a matter which we have considered, and, of course, the commission has functioned and set in motion its jurisdiction. I am coming to that in just a moment.

The CHAIRMAN. There is a bill before this committee introduced by Mr. Taylor. Has your attention been called to that?

Mr. THOMPSON. Yes. I am going to refer to that bill in just a moment.

I have here a classification of the practices involved in applications for complaint. If the committee cares to have it, we will let it go into the record. Advertising leads, false and misleading, with 366 cases. I might say, from my experience in legal practice and from being on this commission, and watching these cases as they come in, that I differ with my associate, Mr. Colver, when I say that 90 per cent of the cases that come before that commission are easily discernible.

(The classification of practices involved in applications for complaint is as follows:)

CLASSIFICATION OF PRACTICES INVOLVED IN APPLICATIONS FOR COMPLAINT.

Advertising:	
False and misleading	366
Refusal to accept	7
Refusal to accept. Inducing	1
Threats to withdraw	1
Agreement with F. T. C., violation of	1
Bogus independents	15
Commissions:	
Secret	7
Split brokerage	1
Competing with purchaser of business and good will	1
Conspiracy:	
To injure competitor	25
Blacklists	6
Contracts:	
Abrogation of	104
Exclusive agency	11
Inducing breach of	25
Exclusive dealing	108
Exclusive selling	4
Exclusive territory	15
Credit, competitor's:	
Shutting off	2
Excessive	1
Defamation:	
Libel	20
Slander	12
Direct selling to consumers by producers or wholesalers	17
Discount, quantity	12
Discrimination:	
In price	103
In freight rates	4
In royalties	2
Disparagement of business	61
Disparagement of goods	50
Drop-shipment offers, discrimination	2
Elevator facilities, denial of use of	2

Employees:	
Bribery of	144
Enticement of	22
Espionage	18
Export trade, unfair competition in	1
Guarantee against decline in price	18
Interlocking directorates	7
Intimidation:	
Boycott	18
Molestation or obstruction	29
Threats	97
Leaders	10
Limitation of output, agreements	3
Lotteries	2
Misbranding	103
Miscellaneous	98
Mismanagement of corporations	4
Monopoly	55
Passing off of goods	74
Passing off of name	53
Patents and copyrights, infringement of	27
Patents, wrongful application for	2
Prevention of competitors obtaining machinery	1
Prevention of competitors obtaining raw materials	2
Prevention of competitors obtaining raw materials or machinery	2
Price:	
Agreements	11
Cutting	117
Enhancement	41
Fixing	62
Quotations, market, refusal of use, etc	1
Rebates	26
Refusal to sell	168
Resale price maintenance	99
Restraint of trade	96
Secret and confidential information, illicit use of	12
Stock:	
Pooling of	1
Purchase of, to lessen competition or to create a monopoly	24
Sale of, misrepresentations and concealment in (blue sky)	109
Suits, malicious and wrongful	24
Supplies, cutting off of competitors	27
Testimonials, misuse of	1
Trade-marks, wrongful application for	1
Transportation, control of	2

NOTE.—It should be borne in mind that one single application may involve a number of different practices. In these cases, a separate index card is put in for each alleged violation of law, and is so counted in the above list.

You wish me, however, to particularly address you on the "blue-sky" subject. I have here the bill of Mr. Taylor, H. R. 188. That bill is a summation of the ideas of the capital issues committee, after a considerable experience in respect to the control of stock of a "wild-cat" or doubtful type. I have gone over that bill several times, and I think, generally speaking, it is very well drawn. I do not know whether you have gone into the terms of the bill or not, but very briefly it is this, that the Secretary of the Treasury shall be the repository of a certain statement of facts which each corporation will have to file with the Secretary when it is to issue a security. The bill goes on in very great detail to state the necessary facts required to be lodged with the Secretary—the corporate officers, the place of business, the necessity of the issuance of the stock, the type of the stock (whether it is common or preferred, or bonds, or whatever it

may be), a full and complete statement of why the issue is being made and who shall partake of the commissions in the promotion of this stock, of the underwriting and the allocating of the same. Then there is tied to the bill a penalty, a criminal penalty, in which I believe the fine is $5,000, or one year imprisonment, for any one who has made a false statement knowingly with respect to the matters required by the Secretary of the Treasury to be filed.

The bill, I believe, is necessary to supplement the present jurisdiction of the Federal Trade Commission, and for this reason: During the war the Secretary of the Treasury, the chairman of the Federal Reserve Board, the capital issues committee, and a number of others, came before the Federal Trade Commission and asked for a hearing. They said the situation had gotten so bad in certain districts of this country, where at the present time there are many promotions going on, that something must be done to restrain "wild-cat" investing, if it was possible. We asked them to show us two things: First of all, was the sale of a bond, stock, or security, carried from one State to the other, interstate in its character. They presented a number of cases (and none of those cases having gone to the Supreme Court of the United States), several circuit court of appeals judges sitting in some of the cases, and most of the cases arising and stopping at the United States District Court doors, and all of those cases, declared that the action of transferring a stock from one State to the other gave it an interstate character; hence it was a transaction in interstate commerce.

The CHAIRMAN. That is, if it was sent from one State to the other in the course of dealing in that stock?

Mr. THOMPSON. Yes, sir.

Mr. STEELE. And did they distinguish that from insurance, which is not interstate commerce?

Mr. THOMPSON. They did distinguish it, in a case (I have forgotten the name of the case), in which Mr. Justice Day wrote the opinion, and which arose in Ohio.

Mr. STEELE. Will you place in the records the decisions you refer to?

Mr. THOMPSON. Yes; I will be glad to insert, with your permission, a "Brief on some points of law involved in blue-sky cases."

The CHAIRMAN. You can insert it when you get the transcript to revise.

(The brief follows:)

BRIEF ON SOME POINTS OF LAW INVOLVED IN BLUE-SKY CASES.

This case presents several questions for consideration:

(1) Whether corporate stock may be the subject of commerce and therefore, if sold by mail, traveling salesmen or otherwise, by persons in one State to persons in other States, such sale constitutes interstate commerce.

(2) Whether the sale of stock by a corporation as a necessary incident of engaging in business under corporate forms, is commerce.

(3) Whether a general business of selling corporate stock of other concerns by persons or by corporations such as is engaged in by large brokerage houses or banking houses, may be interstate commerce.

(4) Whether a local agent to whom is assigned local territory in which to sell stock is in a different situation than if he were selling by mail or traveling from State to State.

(5) The extent of the remedy which may be given by order to cease and desist in this and similar cases. As a part of this question consideration should, perhaps, be given (*a*) to the power of Congress to prohibit the sale of stock in interstate commerce, and (*b*) whether, if such power exist in Congress, it has conferred a similar power upon the commission.

(6) Whether there may be said to be competition in the sale of corporate stock, and if so, the limits of such competition.

1. The United States Supreme Court appears never to have directly passed upon the question whether stock, bonds, and other similar forms of securities are the subject of commerce when they are the subject of barter and sale between persons in different States. The lower Federal courts have frequently held, in passing upon the validity of the State blue-sky laws, that transactions in stocks and bonds between persons in different States constitute interstate commerce and have held the various State blue-sky laws invalid, as a direct burden upon such interstate commerce. The first of these cases appears to have been Alabama and New Orleans Transportation Co. *v.* Doyle (210 Fed., 173, 182), where the district court (Circuit Judge Denison and District Judges Sessions and Tuttle sitting) said in part as follows:

"It must be conceded that, if such burden is created, the act is, so far, void. We can not doubt that stocks and bonds are now the subject of interstate commerce, and that shipments and sales of them, between the States, are interstate commerce. We do not find that this has been expressly held in any authoritative decision, but, in the present development of commerce, it would be regarded as obvious, save for the argument based upon Nathan *v.* Louisiana (8 How., 73, 12 L. Ed., 992), involving foreign bills of exchange, and Paul *v.* Virginia (8 Wall., 168, 19 L. Ed., 357), involving insurance contracts. The former case really involved only the question whether a State tax or license fee could be imposed upon a citizen dealing in foreign bills of exchange. Such a tax, under the rules now familiar, and even if made an incident attendant on interstate commerce, would often be only an indirect burden upon such commerce, and so would be valid. The special insurance contract involved in the latter case is essentially different from stocks, bonds, and commercial paper. However, if either of these cases might otherwise be thought now controlling, we think the opinion in the Lottery cases (188 U. S., 321, 23 Sup. Ct. 321, 47 L. Ed., 492) requires the contrary result. As to stocks, some distinctions from lottery cases can be drawn, because the certificates, in part, represent rights of membership; but we can not appreciate the force of any considerations whereby it might follow that, although lottery tickets are the subject of interstate commerce, bonds and commercial paper are not. They pass freely from hand to hand, title to many of them passing by delivery; they are subject to State taxation; they are protected by State statutes against larceny; in an increasing volume from year to year, they have come to take a most important place in the business and commerce of the country. They satisfy, in every respect, the essentials of the definition in the Lottery cases; indeed, they satisfy the more limited definition contended for in the minority opinion in that case."

A like decision was rendered in Compton *v.* Allen (210 Fed., 537, 546; Circuit Judge Smith and District Judges McPherson and Poleck, sitting). In that case the court said in part:

"* * * That the transportation of such articles of personal property from one State to another for the purpose of better, sale, and delivery constitutes not only commerce among the States of this country, but a very large and important element of such commerce in the magnitude of business transacted and the amounts of money involved, is self-evident."

These decisions were followed in Barcey *v.* Darst (218 Fed., 482, 495); Halsey *v.* Merrick (228 Fed., 805, 806); and Geiger-Jones *v.* Turner (230 Fed., 233, 242), but the opinions in these cases do not contain any particularly illuminating discussion of the subject. While they are the decisions of district courts, in each case three judges were sitting.

The Halsey and Geiger cases, supra, and the case of Caldwell *v.* Sioux Falls Co. went to the Supreme Court of the United States. The court reversed the lower courts in those cases and held the statutes valid, but did not directly pass upon the question of interstate commerce. The chief discussion by the Supreme Court of the question whether these statutes were a regulation of or burden upon interstate commerce, is found in the Geiger-Jones case, where the court pointed out that the terms of the statute applied only to the disposition of securities "within the State," and that so construed, the statute did not impede the transportation of securities into the State. Assuming that corporate securities were proper subjects of interstate commerce, the court further held that the requirements of the statute constituted only an indirect burden upon such commerce such as a State could properly make in the exercise of its police power. The following is taken from the opinion of the court in the Geiger-Jones case.

"The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore contravenes the commerce clause of the Constitu-

tion of the United States. There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of State legislation but it may imply permission of such legislation. In other words, the burden of the legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the national power. So much is a truism; there can only be controversy about its application. The language of the statute is, 'except as otherwise provided in this act, no dealer shall, within this State, dispose' of certain securities 'issued or executed by any private or quasi-public corporation, copartnership, or association (except corporations not for profit) * * * without first being licensed so as to do as hereinafter provided.'

"The provisions of the law, it will be observed, apply to dispositions of securities within the State, and while information of those issued in other States and foreign countries is required to be filed (secs. 6373–6379), they are only affected by the requirement of a license of one who deals in them within the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such."

" * * * The questions are pertinent, the answer to them one way or the other, of consequence; but we may pass them, for regarding the securities as still in interstate commerce after their transportation to the State is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute." (Hall *v.* Geiger-Jones, 242 U. S., 539.)

The decisions of the Supreme Court which appear to be most nearly in point on this question are probably found in the Lottery case (188 U. S., 321) and International Text Book Co. *v.* Pigg (217 U. S., 91). The former case involved the validity of an act of Congress prohibiting the carriage by United States mail, or the carriage generally from one State to another in the United States, of lottery tickets. It was urged that such tickets are not, and could not be subjects of commerce, and this being true, their carriage from one State to another was not commerce. To the first contention, the court said in part:

"It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we can not accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawings of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895."

" * * * We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States."

"The nature of the business done by the International Text Book Co., which is held by the Supreme Court to be interstate commerce, is sufficiently indicated by the following passage of the opinion of the Supreme Court in that case:

"It is true that the business in which the International Textbook Co. is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Textbook Co., located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the

parties have in mind. More than that; this mode—looking at the contracts between the Textbook Co. and its scholars—involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus, and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different States—particularly when it is in execution of a valid contract between them—as is much intercourse, in the constitutional cause, as intercourse by means of the telegraph—'a new species of commerce,' to use the words of this court in Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1, 9 * * * *."

"* * * If intercourse between persons in different States by means of telegraphic messages conveying intelligence or information is commerce among the States, which no State may directly burden or unnecessarily encumber, we can not doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, especially where, as here, such intercourse and communications really relates to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case we shall therefore assume that the business of the Textbook Co., by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature."

If lottery tickets may be the subject of interstate commerce, certainly corporate stocks, bonds and similar securities may be. Lottery tickets partake much more of the nature of insurance contracts than does corporate stock. The lottery ticket is in fact evidence of a promise to pay in the event of a certain contingency. If the lottery refused to pay the owner of the ticket drawing a prize, and such owner were in a jurisdiction where gambling contracts were enforceable, it is conceived that he would seek to recover the prize money in a contract action. In this respect the lottery ticket resembles a contract, but it was urged, unsuccessfully, in the lottery case, that the decision in Paul *v.* Virginia, holding insurance not to be commerce, but a mere contract of indemnity, applied.

On the other hand, a lottery ticket is negotiable in the sense that it could be passed from hand to hand for a consideration and was good in the hands of the holder. Corporate stock is not a contract, in the sense that an insurance policy is, but is evidence of title to a share in the net assets of the corporate property in the management of "the company, and to dividends if there be any. It passes by assignment and in commercial practice is the subjest of thousands of sales per day. Both in thoery and practice the reasons for holding it to be a subject of commerce are much more cogent than in the case of insurance policies or lottery tickets. The only other decision which appears to look towards holding corporate stock not to be a commodity or subject of commrce is Nathan *v.* Louisiana (8 How. 73) where it was held that a broker whose business consisted of buying and selling bills of exchange drawn on persons in different States was subject to State taxation, on the ground that he was not engaged in commerce but in supplying an instrument of commerce. Bills of exchange, however, partake more of the character of money—a medium of exchange—than of a commodity of commerce, where as corporate stock serves no such purpose but is itself the subject of sale.

The board of review is persuaded by the decisions above cited that corporate stocks and bonds and similar securities may be the subjects of interstate commerce, and that where such securities are sold by persons in one State to persons in other States by means of correspondence, or other interstate transmission of intelligence, or by traveling salesmen, it constitutes commerce among the several States and is subject to the regulation of Congress under the commerce clause.

2. It may be questioned whether the sale by corporations not proposing to engage in interstate commerce, either because the business is to be purely intra-State or because the corporation is to engage in some line of business which is not commerce, such as insurance, of the necessary amount of stock to procure capital with which to do business in commerce. It might be urged that such sale of stock is practically an indispensable incident to doing business under corporate form, and, as such sale does not relate to matters of regular continuous business, but usually occurs but a few times at most in the life of a corporation, it does not constitute commerce, the subsequent dealings with such stocks when they have passed into the hands of the purchaser may be commerce. There are certain expressions to be found in the decisions of the Supreme Court construing the Sherman Law which indicate that the continuous character of the transactions may have some bearing upon whether they constitute interstate commerce. Thus, in the International Textbook case the court says:

"* * * We can not doubt that intercourse or communication between persons in different States by means of correspondence through the mails, is commerce among the states within the meaning of the Constitution, especially where, as here, such intercourse and communication really relate to matters of regular continuous business, etc."

Again, in United States *v.* Swift (196 U. S. 375, 398–399), the court says:

"When cattle are sent for sale from a place in one State with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

While these expressions indicate that in order to amount to commerce within the regulating power of Congress, there must be a continuous course of business, they do not by any means decide this point, and the board is of the opinion that when a case is presented wherein this question can be decided, the decision will be in favor of Federal jurisdiction over any amount of commerce between the States. The correct view appears to the board to be found in Steers *v.* U. S. (192 Fed. 1, C. C. A. 1911) where it was urged that the interference by Night Riders with a single shipment of tobacco from one State to another, did not amount to restraint of trade within the meaning of the Sherman Antitrust Act. The Circuit Court of Appeals held that such interference was sufficient, saying in part:

"Trade," as referring to a business which must have a fixed continuance and established character in order to be in existence so as to be subject to a tax or so as to be carried on within a State, can not be synonymous with "trade" in the sense of commerce, or traffic or transportation from one place to another; and so decisions like Cooper Manufacturing Co. *v.* Ferguson (113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137), are not relevant.

"In the Packet Co. case, the interference under consideration, aside from that dependent on the sale of the vendor's good will, was indirect, contingent and uncertain. The court did not say that the amount of traffic was too insignificant to require action, but that this uncertain, remote, and contingent interference was insignificant. In the present case the interference was absolute and entire. All of the traffic or commerce involved was wholly stopped.

"We do not find in the Standard Oil and Tobacco cases any holding that a direct restraint or trade must affect an unreasonably great amount of commerce in order to be within the prohibition. As we read these opinions, the matter under consideration, from the standpoint of reason, was not the amount of merchandise or traffic affected by the restriction, but the character and extent of the restriction itself; and it was thought that, if such restriction reasonably pertained to lawful results, it was not of itself necessarily forbidden. These opinions contain no justification for the idea that a direct and absolute restraint, bearing no reasonable relation to lawful means of accomplishing lawful ends, can be permitted only because the volume of traffic affected is not very great.

"It is true that the theory of injury to the public lies at the bottom of the statute, and that it is directed against things which tend 'to deprive the public of the advantages which flow from free competition' (Northern Securities case, 193 U. S. 197, 332, 24 Sup. Ct. 438, 484, 48 L. Ed. 679); but a single, private injury may well tend to this public result."

Again in Montague *v.* Lowry (193 U. S. 38), it was said that an interference with less than 1 per cent of the business in tiles in the city of San Francisco was within the prohibition of the Sherman law, and in Standard Sanitary Manufacturing Co. *v.* United States (226 U. S. 20, 50–51), it was held that the fact that a small portion of the business of one of the defendants was interstate commerce, was sufficient to bring such defendant within the operation of the act. The following is taken from an opinion of the court:

"The testimony as to the State or interstate character of its business is that it manufactures at Elizabeth, N. J., and buys also from other manufacturers and jobbers. It ships from there to its warehouses in New York, Worcester, Mass., and Brooklyn. The trade of its Worcester branch covers about 200 miles around Worcester, its efforts being to localize its business. It is doubtful, it is testified, if the trade goes beyond Massachusetts, the trade being circumscribed. Sales in Connecticut are made through the New York office from the warerooms.

"It is manifest that the Colwell Co. was a party to the combination and was also engaged in interstate commerce. The fact that its trade was less general than that of the other manufacturers and jobbers does not take from it the character of an interstate trader. The fact that it was restricted in less degree than the other jobbers, given a certain freedom of competition to meet local conditions in New York, diminishes only the degree of culpability but does not entirely remove it. Indeed, it may be said that such freedom does not even diminish culpability. It is a concession, which may be made a means of crushing competition where it is most formidable."

While these decisions do not bear directly upon the point of whether it is necessary that interstate transactions be continuous in their nature in order to be within the regulating power of Congress, they do indicate clearly that although the shipments from State to State be relatively insignificant and more or less incidental, such transactions are nevertheless within the regulating power of the Federal Government. The board, is therefore of the opinion that the fact that a corporation may utilize the facilities of interstate commerce for the sale of a relatively small amount of stock, or that it may engage in such sale for a short period of time, does not render the business of selling its stock any the less interstate commerce, nor deprive the Federal Government of jurisdiction to regulate it for whatever period it may continue. If, then, the Government does not have jurisdiction of the sale by a corporation of the stock necessary to raise capital with which to do business, it must be for the reason that there is something different in the original issuance and sale of corporate stock from the issuance and sale of lottery tickets or of other accepted articles of commerce. It might be urged that the original purchasers of stock are to be regarded as investing in the business itself rather than in the stock, since at the inception of the corporation's existence the value of the stock may be almost wholly speculative or problematical; but that once the business of a corporation has become thoroughly established, and its stock is sold generally on the great exchanges, it comes to be regarded, as a practical matter, as having in itself a recognized value, and is passed from hand to hand as a commodity. The answer to this, however, appears to be that the real value of the stock is at all times to be measured by the value of the assets, tangible and intangible, of the corporation, and the quality of its management, taking into consideration existing business conditions; and the fact that exchange manipulations may temporarily force the quotations of the stock up or down does not change its intrinsic value. The mere fact that the stock of an established corporation may have a more definite value than stock in a corporation just organizing, will not make the sales of the former interstate commerce and the sales of the latter, under similar conditions, something else; nor would the fact that the subscribers to the original issues of the stock of a corporation perhaps contemplated holding it for a substantial period until its value is established, whereas the purchaser on the exchange of the stock of an established concern might contemplate its resale almost immediately, affect the character of the transactions.

The fact that a manufacturer sells to ultimate consumers for immediate consumption does not differentiate his business from that of a manufacturer who sells to the trade for resale. While the difference between the original sales of stock of a corporation and sales of the stock of an established concern, such as sales on an exchange suggests itself, the board finds no justification in the decisions of the courts nor in reason for such a distinction as will take the one out of the operation of the commerce clause and leave the other in Federal jurisdiction, nor can such jurisdiction be affected by the fact that the sale of stock is an indispensable condition of doing business in corporate form. As well might a manufacturer who primarily engages in intrastate commerce but who sells a small surplus in other States, urge that he does not subject himself to Federal jurisdiction. Federal jurisdiction can not be made to depend upon whether interstate commerce is engaged in as a matter of necessity or of choice. The only question to be answered in order to determine the presence of such jurisdiction is does the person in fact engage in interstate commerce?

The board is therefore of the opinion that the sales by the respondent of its stock to persons in various States of the Union, through the services of salesmen and by the use of the mails for correspondence with such salesmen, for advertising stock and for transmitting it, are transactions in interstate commerce and subject to Federal jurisdiction.

3. If corporate stock may be the subject of interstate commerce, it would appear that brokerage or banking houses which engage practically continuously in its sale to persons in various States through the service of traveling salesmen or through the use of the mails and express companies, would be engaged in interstate commerce. Such a business would have all the elements of interstate commerce with the exception, possibly, that the broker or banking house ordinarily does not have title to the stock and sells it on commission for the corporations issuing it. The decision of the Supreme Court of the United States in Hopkins *v.* United States (171, U. S. 578) raises some doubt whether business of this character is interstate commerce owing to the fact that commission men merely furnish a facility of interstate commerce rather than themselves engaging in such commerce. In that case the Government attacks the validity

under the Sherman Antitrust Act of certain rules of the Kansas City Live Stock Exchange. The business of the members of the exchange was to receive individual consignments of cattle and other live stock from the owners of the same in States and territories other than Missouri and Kansas (the exchange being located on the State line between Kansas and Missouri, and partly in both States), and feed such stock and prepare them for the market and dispose of the same, to receive the proceeds and pay it to the owners after deducting the commissions and other charges. The exchange, by rule, fixed the commissions to be charged by its members for selling live stock, prohibited members from buying live stock from a commission merchant not a member of the exchange, prohibited the employment of agents to solicit consignments of such stock except upon stipulated salary and forbade the sending of prepaid telegrams with information respecting market conditions. The Supreme Court held that the business of the commission men was not in itself commerce, and that the rules governing the exchange affected interstate commerce so indirectly and remotely as not to be within the prohibition of the Sherman law. This decision is of such importance that an extended quotation from it appears to be justified. Mr. Justice Peckham, in delivering an opinion, said in part:

"We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?"

* * * * * *

"The business of defendants is primarily and substantially the buying and selling in their character as commission merchants, at the stockyards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stockyards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city.

"If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stockyards for him on commission, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? Or that an agreement between himself and others not to render such services for less than a certain sum was a contract in restraint of interstate trade or commerce? We think not. On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner toward the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce.

"Is the true character of the transaction altered when the owner, instead of coming from Nebraska with his cattle, sends them by a common carrier consigned to one of the defendants at Kansas City with directions to sell the cattle and render him an account of the proceeds? The services rendered are the same in both instances, only in one case they are rendered under a verbal contract made at Kansas City personally while in the other they are rendered under written instructions from the owner given in another State. This difference in the manner of making the contract for the services can not alter the nature of the services themselves. If the person, under the circumstances stated, who makes a sale of the cattle for the owner by virtue of a personal employment at Kansas City, is not engaged in interstate commerce when he makes such sale, we regard it as clear that he is not so engaged, although he has been employed by means of a written communication from the owner of the cattle in another State."

* * * * * * *

"* * * Granting that the cattle themselves because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade. The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agents are not of such nature as to thereby make that agent an individual engaged in interstate commerce, nor is his agreement with others engaged in the same business, as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce.

* * *"

A dictum in this case takes up specifically whether sales of corporate stock or produce by commission men or brokers upon the various exchanges of the country, after the arrival of the stock or produce in the particular cities where the exchanges are located, is interstate commerce. This portion of the opinion is as follows:

"The services of members of the different stock and produce exchanges throughout the country in effecting sales of the article they deal in are of a similar nature. Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations, and the property represented by such shares of stock is situated all over the country. Is a broker whose principal lives outside of New York State, and who sends him the shares of stock or the bonds of a corporation created and doing business in another State, for sale, engaged in interstate commerce? If he is employed to purchase stock or bonds in a like corporation under the same circumstances, he is then engaged in the business of interstate commerce? It may, perhaps, be answered that stocks or bonds are not commodities, and that dealers therein are not engaged in commerce. Whether it is an answer to the question need not be considered, for we will take the case of the New York Produce Exchange. Is a member of that body to whom a cargo of grain is consigned from a Western State to be sold, engaged in interstate commerce when he performs the service of selling the article upon its arrival in New York and transmitting the proceeds of the sale less his commission? Is a New Orleans cotton broker who is a member of the cotton exchange of that city, and who receives consignments of cotton from different States and sells them on 'Change in New Orleans and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? Is the character of the business altered in either case by the fact that the broker has advanced moneys to the owner of the article and taken a mortgage thereon as his security? We understand we are in these queries assuming substantially the same facts as those which are contained in the case before us, and if these defendants are engaged in interstate commerce because of their services in the sale of cattle which may come from other States, then the same must be said in regard to the members of the other exchanges above referred to. We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made."

The decision in this case, then, appears to be an authority for the proposition that where the services of the commission man in selling commodities of interstate commerce are rendered at the point of destination of the shipments, and after the interstate shipment has ended, as distinguished from any interstate shipment which is the consummation of the previous sale within another State which requires goods to be shipped from another, such services are not in themselves interstate commerce. It is important, however, to remember the exact facts in this case lest the decision be regarded as broader than it in fact is. The commission men in that case rendered purely a local service. They received the cattle at the point of destination and there sold them. The buyers of the cattle or their representatives were also located at the point of destination. It does not appear that the commission men utilized the mails or other facilities of interstate commerce for the purpose of soliciting purchasers for the cattle or for any other purpose in connection with their sale. It was alleged that the commission men sent their representatives into other States to solicit from the cattle owners, the privilege of selling the cattle when they arrived at the market. This, however, was not a service rendered in connection with the selling of cattle, for the owner, but was employed only for the benefit of the commission men and solely for the purpose of securing the selling privilege at the stockyards. The rules attack and restrained primarily the business of the commission men in the purely local service of selling at the stockyards. Certain expressions in the decision of the court indicate that it had this fact clearly in mind. Thus the court says:

"Notwithstanding these various matters undertaken by defendants, we must keep our attention upon the real business transacted by them, and in regard to which the section of the by-law complained of is made. The section amounts to an agreement, and it relates to charges made for services performed in selling cattle upon commission at Kansas City. The charges relate to that business alone. In order to obtain it the defendants advance money to the cattle owner, they pay his drafts, and they aid him to keep his cattle and make them fit for market. All this is done as a means towards an end; as an inducement to the cattle owner to give one of the defendants the business of selling the cattle for him when the owner shall finally determine to sell them. That business is not altered in character because of the various things

done by defendants for the cattle owner in order to secure it. * * * In this view it is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed."

If it were not for that part of the decision which stresses the fact that the services rendered by the commission men were in the nature of a facility of interstate commerce—in the nature of personal services—the decision would apparently not be embarrassing in connection with cases of sales of stock where, as in the case here being considered, the instrumentalities of commerce are employed in sales. The Hopkins case has not only not been overruled but subsequent expressions by the court in distinguishing it from other cases, do not serve to indicate just how far the decision will be restricted.

A further important fact to be remembered is that the services of selling in the Hopkins case, followed the shipment into the State. Had the sales of the cattle been made prior to the shipment and the cattle shipped from other States in performance of the contracts of sale, there would apparently have been little question that the transactions were part of interstate commerce. At least the Supreme Court has universally held an agent making sales of this description can not be taxed by the State as such a tax is in fact a tax upon interstate commerce itself. A brief statement of several cases on this point will be sufficient. In Stockard *v.* Morgan (185 U. S., 27) it was held that where merchants and brokers in the State of Tennessee took orders from local jobbers for the products of manufacturers located in other States, subject to acceptance or rejection by such manufacturers, the orders being transmitted to the principals in other States, and shipments made by the principals to the purchasers in Tennessee, the State could not levy a tax on the business of the brokers, since it would amount to a tax upon interstate commerce. In Stewart *v.* Michigan (232 U. S., 665) the defendant who was engaged in soliciting orders in the State of Michigan as a representative of a commercial house in Chicago, was convicted of peddling without a license, contrary to the Michigan statute. It appeared that when the defendant booked any orders he sent duplicates to the Chicago office from which goods corresponding to the orders were shipped, consigned to him in Michigan. When the goods arrived, they were delivered by the defendant to the vendees. On appeal to the Supreme Court of the United States it was held the defendant in negotiating for the sale of goods which were situated in Illinois for the purpose of introducing them into Michigan, was engaged in interstate commerce and that therefore the statute as applied to him was unconstitutional. Kehrer *v.* Stewart (197 U. S., 60) illustrates the distinction sometimes drawn between shipments made from one State to another in pursuance of sales already made and shipments of goods into a State to be there sold by local representatives if a purchaser can not be found. In that case an Illinois firm engaged in the packing business had a wholesale branch in Georgia where its agent solicited orders which were transmitted to Chicago for filling. The meat ordered was sent to agents in Georgia and there distributed to the vendees. Certain meats were also shipped from Chicago to Atlanta without reference to any previous contract and were stored there until sold. The court held that shipments made from Illinois to Georgia to fill specific orders were interstate in character and not taxable, but that sales of meat stored in the State, though shipped from without the State were intrastate dealings.

In view of these decisions it appears that where corporate stock on commission in various States, either through traveling salesmen or solicitation by mail, and having received subscriptions, transmits the stock to the purchasers pursuant to the contracts of purchase such business in interstate commerce. The only argument against its being such commerce which suggests itself is that the broker or agent does not convey the title to the property, but aids the corporation whose stock is sold in disposing of it. This argument is not convencing. Railroads and telegraph lines do not sell anything. They simply convey property or intelligence from one State to another, yet they are held to be engaged in interstate commerce. Their business is declared to be commerce itself. If a brokerage house or other institution doing business in corporate form or otherwise, utilizes the instrumentalities of interstate commerce for the sale of stock or other commodities in various States, it is as truly engaged in interstate commerce as if it owned the property and itself conveyed title thereto.

In the present case the facts show that numerous salesmen were engaged in selling the stock of the Pan Motors Co., a part of the time employed by the corporation itself and at other times by Pandalfo as fiscal agent for the corporation, that the contracts of purchase or subscription were taken by these salesmen in the various States, a portion of the subscription money being collected at the time of sale, if possible, and that the contracts of purchase were forwarded to the Pan Motors Co. or to Pandalfo and the stock shipped to the purchasers by them. Stock was also advertised for sale in the various States and subscriptions solicited. Presumably the same stock was sold by this means. There is no case here of a broker selling property which has been shipped into a State for sale as in the Hopkins case. The facts are practically identical with those in the other cases above quoted from where shipments were made into other States pursuant to contract of sale, already made. The same methods appear to have been employed both by the corporation when Pandalfo was president and by Pandalfo when he was fiscal agent for the corporation. The board is therefore of the opinion that the corporation was engaged in interstate commerce in selling the stock, and that Pandalfo, when operating as its fiscal agent in the sale of its stock, was also engaged in such commerce and that the commission would have jurisdiction to enter an order against either in a proper case.

4. It appears in this case that the Pan Motors Co. employs a very large number of salesmen who sell its stock upon commission. It does not appear, whether these salesmen travel from State to State in making sales. From the decisions already discussed, it would appear clear that a local salesman who is engaged in selling goods from other States which have not been introduced into the State, but which are brought in pursuant to contracts of sale made by him, is engaged in interstate commerce. At least the decisions are clear that a tax on such an agent is a tax on interstate commerce. The conclusion that an agent is engaged in such commerce would logically follow. If this be true, no reason suggests itself why such agents would not be subject to an order by the commission to cease and desist from engaging in unfair methods of competition in such commerce. There appears to be no reason, however, for joining any of these local agents in a proceeding against the Pan Motors Co. The board is of the opinion that the company, or Pandalfo can be held for misrepresentations of these agents made in the course of their employment. On this point the following is quoted from a recent opinion of District Judge Sanborn:

"The evidence shows that agents of the plaintiff in selling the Todd machine, and so far as they sold Hedman exchanged machines, have to some extent used similar reprehensible methods of competition; and it is claimed that the plaintiff, seeking equity in its favor, has not done equity toward the defendants, and therefore is not entitled to a decree against unfair competition, upon the equitable rule of 'clean hands.' This leads to an examination of the law in respect to how far the acts of sales agents bind their principals in a situation like this. Sales agents may charge their principal with liability for their unfair competition, although the latter is ignorant of their methods, because they are agents to sell, and their sales methods are as a matter of law those of the principal. Their agency, however, does not extend to direct injury of the principal by charging it with unjust conduct in pursuing its business.

"'The doctrine that he who comes into equity must come in with clean hands does not recognize mere imputations of guilt based upon technical theories of agency. To invoke it a knowledge must exist on the part of the principal of the facts upon which the charge of unconscionable conduct is based, and in the case of a corporation those facts must be brought home to the persons exercising general control over its affairs. * * * On the other hand, * * * the liability of the defendant for the acts of its agents exists entirely irrespective of knowledge of its officers.' (Citing International News Service *v.* Associated Press, and other cases.)

"* * * There is no evidence that plaintiff authorized or had knowledge of any acts of its agents which would deprive it of the right to an injunction against unfair methods of competition on the part of defendant's salesmen, nor is there very much evidence of such unfair methods. Unfair methods of plaintiff's agents might, indeed, be so general and persistent as to require the inference of knowledge by the principal, but the evidence fails on this point."

The Pan Motors Co. or Pandalfo appear to recognize that they are liable for the acts of the agents as the contracts with such agents expressly provide that they shall be personally liable for any misrepresentations made by them in the sale of the stock.

5. It becomes necessary to determine as a general proposition in connection with these cases, and perhaps also it is necessary to determine in this particular case, the extent of the remedy which the commission may afford. The most important question perhaps is whether the commission can in any case in terms unconditionally prohibit the sale of corporate stock in interstate commerce. This raises the question, first, whether the power of Congress to regulate commerce extends to the right to prohibit parties from engaging in such commerce in the sale of stocks, bonds, or other securities: and, second, if this power exists, can the sale of stock be prohibited if it in fact has a

substantial value? It is now well established that the power of Congress to regulate commerce includes, in a proper case, the right to prohibit persons from engaging in interstate commerce, or perhaps more accurately stated, includes the right to exclude certain commodities from interstate commerce. It appears, however, that the statutes excluding certain commodities from the channels of interstate commerce, or prohibiting parties from engaging in such commerce, have all been in the nature of national police regulations; that is, have been enacted for the purpose of protecting the health or morals of the citizens of the United States. It was strongly contended at one time that the power to regulate commerce being the power to prescribe the rule by which interstate commerce should be conducted, necessarily did not include the right to prohibit such commerce, and that such prohibition was in violation of the fifth amendment of the Constitution since it deprived persons of liberty without due process of law. This point was strongly urged in the lottery case. The contention and the court's answer to it may be found in the following excerpts from the decision in that case:

"We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulations of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must to create the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?

"In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress can not be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In Phalen *v.* Virginia (8 How. 163, 168), after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government, this court said: 'Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.' In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public duty by saying that it had agreed, by legislative enactment not to do so. (Stone *v.* Mississippi, 101 U. S., 814; Douglas *v.* Kentucky, 168 U. S., 488.)

'If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. * * *."

'* * * As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, can not be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation,

the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: 'The framers of the Constitution never intended that the legislative power of the Nation should find itself incapable of disposing of a subject matter specifically committed to its charge.' (In re Rahrer 140, U. S., 545, 562.) If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right."

It will be seen that the court sustained the act on the ground that it was necessary to protect the public morals rather than that it was in any way intended to protect the public from pecuniary loss incident to ill-advised investments.

Apparently, under similar reasoning, the court has sustained the pure-food law which prohibits the introduction into States by means of interstate commerce of impure or adulterated foods or drugs (Hipolite Egg Co. *v.* U. S., 220 U. S., 45); the white-slave traffic act, which prohibits the transportation of women in interstate commerce for immoral purposes (Hoke *v.* U. S., 227 U. S., 308; Caminetti *v.* U. S., 242 U. S., 470); the act barring obscene literature from interstate commerce, and very recently the Webb-Kenyon act, prohibiting the shipment in interstate commerce of intoxicating liquors to be received, sold, or used in violation of the law of any State. (Clark Distilling Co. *v.* Western Md. Ry. Co., 242 U. S., 311.) In Hoke *v.* U. S., supra, the Supreme Court summarized the character of commerce which had been prohibited, as follows:

"If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

The most recent attempt of Congress to bar products from the channels of interstate commerce—the child-labor act—was declared unconstitutional. The act provided that certain classes of products should not be shipped in interstate commerce if, within 30 days prior to the time of the removal of the products from the factory or mine, children under 14 years of age had been employed, or permitted to work. The court (Justices Holmes, McKenna, Brandeis, and Clarke dissenting) pointed out that those acts of Congress prohibiting interstate commerce which had theretofore been sustained, had sought to protect the health or morals of the citizens, and that the right to prohibit was dependent upon the character of the particular subject dealt with. The following is taken from the opinion:

"In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the fact that the scope of governmental authority, State or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate."

A further expression on this point is found in Clark Distilling Co. *v.* Western Maryland Ry. Co., supra, where the court said:

"The exceptional nature of the subject here regulated (prohibition of shipment of whisky in interstate commerce) is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently, with the guaranties of the Constitution, embrace."

In the child-labor case, after reviewing certain of the decisions referred to, the court says:

"In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended. This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers

in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after 30 days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power."

One very clear distinction between the cases where prohibition of interstate commerce was sustained and the Child Labor case lies in the fact that in those cases where the power was upheld, the article was itself either deleterious or injurious, or the instrumentalities of commerce were used to corrupt the morals of the citizens of the various States. In the Child Labor case the product was itself harmless and its shipment in interstate commerce would not directly injuriously affect the citizens of other States, though remotely it might affect them by inducing child labor in States other than that of the origin of goods made by child labor in order to compete in interstate commerce with such goods.

In the case of sale of stocks in interstate commerce, it is obvious that the instrumentalities of commerce are used to effect a fraud upon the citizens of a number of States, and in this respect there is a similarity between such sales and the sales of lottery tickets or impure food. The primary distinction between the sale of fraudulent stocks in interstate commerce and the sale of impure foods and of lottery tickets is that the primary result of the former is to pecuniarily injure the citizens of the various States, while in the latter two instances, the primary effect is upon the morals or health.

Reverting to the nature of the commodities or of the business prohibited, it will be seen that none of them is based upon the ground that the purpose of the legislature was to prevent widespread fraud upon the citizens of the States, but upon the protection of the morals or health of the people. Thus, it will be seen that while it is sometimes said that the Federal Government does not possess police power, in effect a police power was exercised in the lottery, pure food, white-slave traffic, and similar statutes. If there be any analogy between the police power of the States and the power exercised by the Federal Government in the passage of these statutes, such power could, it would appear, be extended to prevent the widespread commission of fraud upon the citizens of the various States by use of the instrumentalities of interstate commerce.

That the police power of the States includes the power to prevent widespread fraud upon the citizens of the State is so well established as not to require citation of authority. The various State blue-sky laws have been sustained on this ground. If the States, acting under that false power may prohibit the fraudulent sale of stocks in intrastate commerce, it would appear that the Federal Government may similarly regulate their sale in interstate. If it can not do so, it must be for the reason that the power to prohibit interstate commerce will not be upheld by the courts except to protect the health or morals of the citizens of the various States. There has, as yet, been no decision denying the existence of the power to prevent fraud in a general case and until such decision is had, it would appear better to assume the existence of the power.

Congress has seen fit, under the post roads clause, of the Constitution, to prohibit the use of the United States mails for fraudulent purposes. The language of the clause is very general, being as follows:

"The Congress shall have power to establish post offices and post roads."

Under this power Congress has made the carriage of mail a monopoly in the Government, but nevertheless makes it a criminal offense to use the mails to obtain money by means of false or fraudulent pretenses, representations, or promises, and authorizes the Postmaster General to deny the use of the mails to persons seeking to defraud in this manner. If this power may be exercised under the post roads clause, it would appear that the power of Congress under the commerce clause would extend to denying the use of other instrumentalities of commerce for similar purposes.

In view of the decision in the Child Labor case, however, it would appear clear that Congress does not have the power to absolutely prohibit the sale of stocks in interstate commerce, or to forbid the use of the instrumentalities of such commerce in its sale. Perhaps the vast majority of interstate transactions in the sale of stock are bona fide, the stock sold having a real value; but a statute which provided that upon proof that the stock being sold in interstate commerce was worthless, i. could not be sold or transported in such commerce, would seem to be a proper exercise of the regulating power and a natural corollary to previous acts prohibiting interstate commerce which was injurious to the health or morals of the people generally.

If, however, the stocks of a corporation have an actual value, but that value is being knowingly misrepresented for the purpose of inducing its sale, with the result that purchasers are being defrauded, it would seem that the constitutional extent of the power to regulate would be to prevent the misrepresentation concerning the stock and leave the owner free to sell it at its real value. The extreme measure of prohibition could be sustained only where it was demonstrably impossible to prevent the fraud, save in this way.

In the light of the above decisions, the board is of opinion that Congress could constitutionally empower an administrative body to investigate the business of persons selling stock in interstate commerce, and if it were proven that such stock was without value, to issue an order prohibiting the further sale of the stock in interstate commerce, giving the parties the right of court review as in the commission act. If the stock have substantial value, however, it will probably not be competent for Congress to prohibit its sale, though it could regulate it by authorizing the administrative body to prevent fraud or misrepresentation in connection with the sale. Assuming that the power of Congress in the premises is as stated in paragraph last preceding, can the commission under the general power conferred in section 5 of the commission act prohibit the sale of stock by order to cease and desist from such sale, when it appears that the stock is worthless, and if not, just what power does section 5 confer upon the commission in such cases? It may be urged that the selling of stock which is worthless and known to be so by the seller, is of the very essence of unfair competition since the public is wholly deceived and gets nothing for its money. A partial answer to this appears to be that it would be impossible to sell such stock at all save through misrepresentation, and that a sufficient remedy would be afforded by preventing the misrepresentation, thus indirectly preventing the sale. The board is of the opinion, however, that as a practical matter frauds in the sale of such stock can, in many cases, be eliminated effectively only in preventing the sale of the stock.

But while Congress is authorized by the Constitution to prohibit the sale of worthless stock, the board is of opinion that such power, being the extreme of regulation, will be held by the courts not to have been conferred upon an administrative body unless the language of the statute in this regard is clear, specific, and unmistakable. Section 5 of the commission act authorizes the commission to prevent the use of unfair methods of competition. It would be an extremely liberal construction of this language which would hold that it conferred the power to prohibit absolutely and unconditionally the sale of a commodity in interstate commerce as distinguished from an order which would prohibit its sale unless certain unfair methods of competition employed in connection therewith were discontinued or unless the company disclosed certain facts in connection with the sale.

The board has heretofore had some doubt whether even this latter power is one which the commission can exercise, since it is an order commanding a positive thing rather than an order to cease and desist. Without prolonging this report with the citation of authority, the board is of opinion that the wording of the commission act is too general to authorize the prohibition of the sale of stock in interstate commerce.

In the particular case now under consideration it would appear clear that the commission can not prohibit absolutely and unconditionally the sale of stock. The report of the J. G. White Co. shows that the value of the assets of the company is in excess of 60 per cent of the par value of the outstanding stock. The stock, therefore, has a substantial value. This value can probably only be increased and preserved by acquiring additional capital with which to develop the business of the company. There would appear to be no good reason why additional stock should not be sold in order to acquire the necessary capital, at least if the present condition of the company's business be frankly stated to the buyers of the stock.

But, while the board is of opinion that section 5 does not confer the extreme power of prohibiting interstate commerce, it is of opinion that in the sale of stock, as in the sale of other commodities, section 5 confers power to prohibit unfair methods in connection with the sale, if there be competition in such sale.

6. Coming now to the application of section 5 of the commission act to sales of corporate stock, can there be unfair methods of competition in the sale of such stock? First, is there competition in such sales, and, if so, what is its nature? The examining attorney in this case appears to take the position broadly that competition was present in the sale of the Pan Motors stock, because other business organizations were striving for the same money which went into the stock of the Pan Motors Co. The board is of opinion that competition as used in the trade commission act does not have a signification as broad as the examining attorney places upon it. There is, perhaps, little in the decisions of the courts which will throw much light upon the question. It may be well to notice, however, the construction which the court has placed upon

the words "Any part of the trade or commerce among the several States" in section 2 of the Sherman Antitrust Law. In Standard Oil Co. v. United States (221 U. S., 1, 61), the Supreme Court says:

"The commerce referred to by the words 'Any part' construed in the light of the manifest purpose of the statute, has both a geographical and distributive significance, that is, it includes any portion of the United States, and any one of the classes of things forming a part of interstate or foreign commerce."

Some conception of the legislative idea of competition as used in this act may be had also from the language of sections 2 and 3 of the Clayton Act where price discrimination and tying contracts are declared unlawful if the effect thereof may be to substantially lessen competition or tend to create a monopoly in any line of commerce. The expression "line of commerce" here indicates that the legislative mind was dwelling not on competition in its broadest economic aspect, but upon that competition in interstate commerce between persons selling the same article, the same class of articles, or at most, selling articles which supply the same general want. The board is therefore of the opinion that the Pan Motors Co. was not in competition, within the meaning of that term as used in the trade commission act, with other persons striving to get the same money paid for Pan Motors stock as a consideration for supplying some other article. On the other hand, the board conceives that the Pan Motors Co. was, and is in competition with all other concerns selling stocks and bonds in the communities where the Pan Motors stock was, or is, being sold. It may be urged that it competes only with other concerns selling automobile stock, but this interpretation appears to the board too narrow. As a general purpose, persons having money to invest do not arbitrarily determine to invest it in stock of some concerns engaged in a specific line of business, but seek that investment which offers the best return consistent with safety, if the buyer be conservative, or if he be seeking a speculative stock, he will take that which appears the most attractive, regardless of the particular line of business.

Nor does it appear that the probable injury to other sellers of stocks and securities by the sale of Pan Motors stock is too remote to be within the operation of section 5 if the methods of competition of the Pan Motors Co. are such as are calculated to injure such competitor. In a recent decision of the circuit court of appeals in the Sears Roebuck case, the court says that the commission does not have to aver and prove actual injury to a competitor, but if the practices have a capacity or tendency to injure competitors directly or through deception of purchasers, they are within the prohibitive power of the commission. The following is an excerpt from Judge Baker's opinion:

"The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the Government as parens patriae are to exercise their common sense as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices which have a capacity or tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases."

While there is at this time no proof in the record that other companies were selling stocks, bonds, or other securities in the same communities where the agents for the Pan Motors Co. were operating, it is unquestionably a fact that there were stocks being offered. Nor does it appear to be too remote to say that the stock of the Pan Motors Co. was in fact competing with the stocks and bonds daily sold on the great exchanges of the country since the brokers on the various exchanges have representatives throughout the country, and the buyers of Pan Motors stock might in many instances, have purchased other stock.

Furthermore, United States Government bonds of the various "Liberty issues" were being sold in every city, town, and hamlet in the country at the time some of the stock of the respondent company was being sold. There was, therefore, unquestionably direct competition between the Government in the sale of its bonds and the respondent company in the sale of its stock.

(Signed) ADRIEN F. BUSICK,
Acting Chairman, Board of Review.

Mr. THOMPSON. The second proposition to be convinced of was the existence of competition as between the "wild-cat" stock and the legitimate stock? We in the Federal Trade Commission never believed that we should pass on the question of unfair competition simply because of the speculative value of the stock, because we have seen within the last couple of years a most wildly speculative stock

in oils where they struck a wonderful well; so that we have avoided passing on the question of the speculative value, but we did impigne on the question as to whether there was competition as between the wild-cat stock and the legitimate stock. We have had some cases before us already where that situation has been devoloped fairly well; well enough so that we believe we will be sustained by the Circuit Court of Appeals if an appeal is taken from our order. However, it is a tremendously hard question to develop from the evidence as to whether there is an actual competition between the speculative, or wild-cat, or fake stock, and the legitimate (for example, deposits in banks that are drawing 3 or 4 per cent, and savings accounts), whether there is competition in a situation of that kind.

We have had one case (I will not refer to the name) concerning the sale of the Government bonds. During our campaign for the sale of bonds there was a constant transfer from what was alleged to be wild-cat stock over to the bonds; in other words, the bonds were turned in for a wild-cat stock, and the question was whether there was competition there or not. A great many authorities hold, that is, economic authorities, that there is competition in the money market. Now, if our act is amended so as to cover unfair acts, rather than unfair competition exclusively——

The CHAIRMAN. Unfair practices?

Mr. THOMPSON. Unfair practices—but we, I believe, have got the word here "acts." Somebody here to-day did suggest "practices," but in consultation with others they seemed to think that "practices" required a greater proof than "acts" and hence we limited it to acts. If there is an amendment which will include unfair acts, then we can function jurisdictionally simply on the question as to whether there has been *an* unfair act in business and not have to go to the point of showing competition, and simply showing the interstate commerce character attached to the stock.

This will not, however, reach the whole situation, and so (I come to this bill which is before your committee, H. R. 188, introduced by Mr. Taylor, of Colorado. The reason the commission's present jurisdiction will not reach the situation is this: In the last year there have been thousands of companies created almost over-night. I say thousands, because I happen to know of over a thousand in one district, and I have had charge of what is the so-called "blue-sky" department of our commission. We have found that those who were designedly defrauding instead of issuing a large capital stock, simply created a company, we will say, of $100,000 par value $1 a share, possibly $10 a share. By the time we could get down into the district where they were and make an investigation, they would have had a stock selling campaign on and would have cleaned up and gotten away.

One of the things about this commission is that with care it tries to function more rapidly than the courts, and I think that is one of the great reasons for its existence. Up to date it has functioned more rapidly than the courts. But while we can function rapidly, if we are going to function carefully, the get-rich-quick Wallingford is too fast for us. Hence there must be some intervening step by which we can catch the man who is trying to promote a stock of that kind at the inception of his act; and, not only that, but even the man who, not intending to do falsely, still overstates the value

of his security. I think the Capital Issues Committee, in its bill has prepared a very good system and form, with one or two amendments. I will address my remarks very briefly to those amendments.

The CHAIRMAN. The form is to some extent modeled on the English law, is it not?

Mr. THOMPSON. I think it is, and I think they have also taken some of their forms from the many State laws. I have a compilation of all the State laws if this committee should be interested—I think all the State laws up to date.

The CHAIRMAN. Have you got them in printed form?

Mr. THOMPSON. Yes, sir; in book form, giving a digest of them and giving the intent and portent of each one of them.

The CHAIRMAN. Is it a Government publication?

Mr. THOMPSON. No; it is a publication that has been gotten out by somebody and a copy sent to us. I do not know just who got it out, but I have it in that form.

I read from subsections (*f*) and (*g*), pages 4 and 5 of the Taylor bill:

(*f*) The amounts of money or other consideration paid or delivered or agreed to be paid or delivered within a year preceding the date of the statement, by or for account of the corporation to any person for the purpose of selling, disposing of, dealing in, or marketing its shares or securities of any kind, and the names of all such persons.

(*g*) The purpose for which the shares to be offered were issued or are to be issued by the corporation, the consideration received or to be received by the corporation therefor, the amount of all commissions and other consideration paid or payable by or for account of the corporation for or in respect of the issue, sale, or offer of the said shares, and the application of the consideration receivable from the public for the said shares.

And then section 7:

SEC. 7. That each prospectus, advertisement, circular letter, and communication offering to the public shares specified in any of the said statements shall contain a reference to this act, and shall mention the fact that the statement relating to the shares offered has been filed in accordance with terms hereof, stating the places where copies of such statement are filed, and that the same are open to public inspection and shall offer to send to any person requesting the same a copy of such statement by mail, postage prepaid. Copies of all such prospectuses, advertisements, circulars, letters, and communications shall be filed at the same places at which the said statements and copies thereof are required to be filed. All statements, copies, prospectuses, advertisements, circulars, letters, and communications shall be open to public inspection.

Copies of the information thus required are to be filed in two places—with the Secretary of the Treasury and at the post office at the capital of the State where the organization was created. I think in order——

The CHAIRMAN. If the organization was created in New Jersey and the corporation was to operated out in Minnesota, how much good would it do to have that prospectus filed over in New Jersey?

Mr. THOMPSON. How much good would it do?

The CHAIRMAN. Yes.

Mr. THOMSPON. That is just the point I am coming to. I suppose that any person seeing an advertisement of the stock and knowing it was a corporation of New Jersey from the advertisement, because the advertisement would require that, could write to the Secretary of the Treasury, or to the post office at Trenton, for example, and call for a copy. But the average individual does not do that when he buys bonds, stocks, or securities. I think that everyone of us will admit he would not do this, but would take the word or statement of

somebody who is attempting to sell it. And so I say we ought to go a step further and that we ought to require in the prospectuses, advertisements, or in circulars, presenting or promoting stock, certain facts, in type larger than the type on the front page of the prospectus or in the page of the advertisement. Hence, I have drafted a section here, after a good deal of consideration, to be added as an amendment following section 7, page 7, of H. R. 188, which is as follows:

Mr. STEELE. That is an amendment to Mr. Taylor's bill?

Mr. THOMPSON. Yes; I have talked with Mr. Taylor about it, and he is in perfect accord with the suggestion. It reads:

Every person, firm, association, or corporation offering for sale to the public in interstate commerce bonds, stock, or other evidences of ownership in any corporation, shall print on the front page of any and all circulars, prospectuses, letters, literature, and in the body of any advertisements describing or mentioning the securities for sale, in type larger than the type otherwise used, the names of the promoters and underwriters and the rate of commission or commissions received by those promoting, consolidating, underwriting, or selling said securities, and the net amount to be received from said sale by the issuing entity, corporation, or association.

That can be put in a very brief amount of type, in a few lines, showing what the issuing corporation is to get back as its net amount; what the allocating company, for example, in a great issue of securities, is getting for the allocating; what the promoting company, for example, in a "wild-cat" stock campaign, is getting. We will then put the purchaser on notice to the point where he has about as much protection, it seems to me, with the additional protection that is given in the bill of Mr. Taylor, as it is possible to offer. At the same time, the Federal Trade Commission can exercise jurisdiction on the question where there is unfair competition, or if our Federal Trade Commission act is amended so as to cover unfair acts, then the commission will be freed from establishing the question of competition.

I also call your attention to the last sentence of section 9, page 8, of the said H. R. 188, which excepts from the terms of the bill securities sold "at public auction or on stock exchanges approved by the Secretary of the Treasury etc.," and I suggest that the same be amended by striking out that part and more particularly as follows:

The provisions of this act shall not apply to sales at public auction, or on stock exchanges approved by the Secretary of the Treasury, nor to offers of shares owned by bankers, brokers, and dealers to their customers in accordance with licenses granted by the Secretary of the Treasury.

I also suggest that said bill be amended by striking out section 10 on page 9, which gives the Secretary power to suspend or waive the provisions of the aforementioned act under certain conditions. I do this in full knowledge of the dignity of the office of the Secretary of the Treasury and in no sense reflect upon past, present, or future occupants of that lofty position. I do not believe, however, that any individual should have the power to make exceptions in the case of sales at public auction or on stock exchanges, or shares offered by bankers, brokers, and dealers to their customers, for there have been many instances where the security behind such shares turned out to be of very doubtful character. The purpose of this act, as I understand it, is to protect the innocent American buyer of stocks and securities and to offer him as complete a knowledge of the integrity of the security as it is possible to obtain. I can not see why the man purchasing through a banker or broker, even though the stock be ap-

proved by the Secretary of the Treasury should not be required to tell in any advertisements put out for the purpose of selling the stock just how much the company issuing the stock is to get from said sale and the rate of commission received by the allocating company or brokers. Again, I do not see why the Secretary of the Treasury should be given the power to waive the provisions of this act with respect to shares heretofore issued or contracted to be issued. I do not believe he would have control over those already issued as that would be making the act retroactive in effect.

I would not waive the effect of this act "with respect to the offer of shares in which the corporation which issued such shares is not interested or concerned." It seems to me that the corporation issuing such shares must always be interested. At least the purchaser of those shares would be interested in knowing what the corporation issuing them expected to get by way or net returns from their sale. Nor would I exempt from this bill shares of "corporations organized outside of the United States." Once those shares are offered for sale within the United States the party offering them should be compelled to file the information and documents required under this bill just as much as in most of our States a foreign corporation doing business in another State is required to file its articles of incorporation and to conform to certain laws and regulations of the State in which the foreign corporation is doing business.

The next proposition I come to (and I see I am still within my time by 10 minutes or 15 minutes), is the question of amending our act——

Mr. STEELE. By that you mean the Federal Trade Act?

Mr. THOMPSON. The Federal Trade Commission Act—by making our order go into effect immediately upon its being issued. As I said, we are an administrative body. As an administrative body we function as the Secretary of the Interior does when he makes a land withdrawal or the President does when he makes a land withdrawal. When we sit upon the facts in a case, we sit as a jury—we do not sit as a court—we sit simply as a jury, finding a special verdict.

The CHAIRMAN. But that verdict can be sustained, can it not, without a review of the facts?

Mr. THOMPSON. The verdict can be sustained if there is evidence to support the findings in the circuit court of appeals. The respondent has his day in court when he gets in the circuit court of appeals.

The CHAIRMAN. On the question of law involved, but not so far as the facts are concerned.

Mr. THOMPSON. He can attack the facts if there is no testimony supporting the finding.

The CHAIRMAN. And if he does attack the finding of facts, he must show that as a matter of law they are not sustained by the evidence.

Mr. THOMPSON. A question of law and fact; yes.

Mr. STEELE. The circuit court accepts your findings of facts?

Mr. THOMPSON. They accept our findings of the facts, in the language of the act, "if the findings of fact are supported by testimony."

The CHAIRMAN. The same as a verdict of a jury would be?

Mr. THOMPSON. Yes.

Mr. STEELE. But they do not weigh the evidence again; they only see if there is any evidence to support it.

Mr. THOMPSON. Yes; but in the Warren, Jones & Gratz case, which we have now taken to the Supreme Court on a writ of certiorari, the court has weighed the evidence. We say it has no right to do so if the findings "are supported by testimony." And they weighed it upon this proposition, that we did not show a general practice; we reply that the substantive law in our act does not require us to show a general practice. That is the issue before the Supreme Court in that case.

Now, we say that unless our order can go into effect immediately after issuance the unfair practice may continue many months, often to the ruin of the party injured, and we really can not be effective in establishing competition in this country.

I should like to refer you to a situation arising under the Webb-Pomerene Act. We have already had one case under that act, not reaching a decision, but the complaint and answer have been filed and issue joined. The question considered there is whether a company created in the United States and selling an article in a foreign country which had been manufactured in the United States had the right to brand the article as made in another foreign country, said other foreign country being more popular than the United States in the country where the article was being offered for sale. The party alleged to have been injured was a corporation of the United States and sold its article in the same foreign country, but the brand which it used showed that its article of sale was made in the United States. It alleged that the company using the foreign brand was practicing an unfair method of competition. Let us suppose that we were to issue an order to the respondent in this case to cease and desist. We have not the machinery nor appropriation by which we can police the situation in the foreign country where the article was sold.

In other words, in all these cases we are constantly confronted with the question of policing our own orders. Take the "blue-sky" situation. Supposing we issue an order against one of the fly-by-night gentlemen who float from one State to another, or one of his companies, and there are quite a few of them. They may have completed their sale and moved from Texas to Wyoming (the same company moving from one State to another and putting their stock on sale at another place). We can not police our order; we can not stop those people because we have not the means or time to follow. And so we say in a case of that kind, if we could have our order issued and the case given the right of way in the circuit court of appeals, if there was an objection to our order, the respondent could have the matter settled very quickly and we would be a real factor in the world of competition.

By way of illustration, I again call attention to the case of Warren, Jones & Gratz. There the respondent sold 75 per cent of all the steel ties that are used for binding cotton. The same concern sold 47 per cent of all the jute bagging that goes around cotton. They have refused in many instances to sell ties unless the purchaser also bought bagging. It is said we failed to show a general practice. We set forth a number of telegrams and letters and a number of instructions to various parties showing a refusal to sell steel ties unless they bought a certain amount of jute bagging. We presented evidence of a number of parties who had all the jute bagging they wanted, but, having to buy steel ties from the respondent, were compelled to buy more of

the jute bagging. We ordered respondent to cease and desist from this practice on the ground that it was an unfair practice. Our order went out, I am safe in saying, eight months ago. The case went to the circuit court of appeals. It has been tried, and it was remanded to us with an order to withdraw our order. We have taken a writ of certiorari to the Supreme Court, and we will probably argue that case in the Supreme Court in November and get a decision perhaps in January. But by that time a whole season will have gone by and the smaller competitor who has complained may be destroyed. We believe the public is affected, because this one concern controls 75 per cent of all the steel ties that are used in the entire cotton industry in this country. Now, if our order could issue, the worst that could be done to the respondents would be to place them in the same position as their competitors, namely, that a purchaser could come and buy the jute bagging, if he wanted it, or he could buy the steel ties, but would not be forced to buy both when he only wanted one. We have therefore drafted a section, called section 5-A, to the Federal Trade Commission act, to cover this situation. It is a paraphrase of the language of a similar section of the Interstate Commerce Commission act. As you know, the Interstate Commerce Commission did not really begin to function until it had this power of having its orders go immediately in effect. I will read it to you:

All orders of the commission shall remain in force and effect until modified or set aside as provided in section 5 of this act, and it shall be the duty of every person, partnership, or corporation against whom the same may be issued and served, their officers, agents, and employees, to observe and comply with the same, so long as they remain in effect.

In case of failure or refusal on the part of any person, partnership, or corporation to comply with the terms of any order duly made by the commission, under the provisions of this act, such person, partnership, or corporation shall be liable to a penalty of $500 for each such offense, and $25 for each and every day of continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

We say that if the committee, or if Congress will give us this additional power, we can function in such a way that we believe we can maintain competition in this country.

Mr. STEELE. The language you have in your proposed amendment, there, would it give the circuit court the right to enter a temporary order of supersedeas, if it saw fit to do so, on an appeal—that is, if an appeal were pending?

Mr. THOMPSON. If an appeal were pending after application?

Mr. STEELE. The language there would make the judgment effective pending the appeal. Now, would it also give jurisdiction to the circuit court to enter a temporary order of supersedeas if the case warranted in their judgment?

Mr. THOMPSON. I would say from that language that it would not. Is not that the idea you gather from it?

Mr. STEELE. That was the idea from the term you used—modify; but I did not know whether that applied to a temporary order or only to a final order of the circuit court.

Mr. THOMPSON. I think that would not give the court the power of issuing a supersedeas. I would like to look into the practice in the Interstate Commerce Commission cases and see what has been done there. Undoubtedly we would find a precedent there. There is still another proposition which I wish to refer to as an amendment to the Clayton Act.

Mr. STEELE. What section?

Mr. PORTER. That is the one I submitted to you the other day.

Mr. STEELE. With reference to purchasing the stock?

Mr. PORTER. No; in reference to the proposition that when a company has been dissolved by a court, you know, for violation of the Sherman Act, prohibiting the same person from owning stock in any two of those constituent companies.

Mr. STEELE. To meet the Standard Oil decision?

Mr. PORTER. That is the point exactly.

(The suggested amendment above referred to is as follows:)

It shall be unlawful for any person, partnership, or corporation, directly, or indirectly, to own or hold any of the stock or share of the capital of more than one corporation that has formed a part of or is a successor of any corporation or combination which has been dissolved by a court as being in contravention of the act of July 2, 1890, "to protect trade in commerce against unlawful restraints and monopolies."

Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

Mr. THOMPSON. The reason for proposing this addition to the Clayton Act may be most clearly shown perhaps by telling you how it came to be first proposed.

In 1916 the Federal Trade Commission had under consideration a report on the price of gasoline, and in particular the causes of the rapid advance in prices and the wide discriminations in prices between different localities. It was found that the various Standard Oil marketing companies which had been separated from the control of the Standard Oil Company, of New Jersey, the old holding company, were not competing with each other in the sale of gasoline and kerosene. Each had a separate territory for the sale of its goods and refrained from selling in any other. The reason for this lack of competition was found to be in the fact that the majority of the stock in each of these companies was held by a small number of shareholders and that substantially the same group of men dominated each of these companies. In other words, unified control had resulted from dividing among the stockholders of the holding company the stocks of the various subsidiary companies which were separated from it.

The Commission was well aware, of course, of the fact that similar decrees of dissolution had been made with respect to other monopolistic combinations. Believing actual experience had proved such decrees to be ineffectual and that the courts had themselves recognized this in some more recent dissolution decrees, the commission sought for a remedy for all the dissolutions which were affected by this fundamental vice.

This remedy, now recommended, which I believe to be by far the most efficacious one considered, was mentioned in its report on the price of gasoline.

The proposed law requires from some of the combinations which were first dissolved substantially what the courts required later from some others when experience proved its necessity.

The man who owns shares in more than one of such corporations can take his choice as to which one he will retain stock in, but he can not retain stock in more than one of them. While it is possible that in the course of a generation or so such alliances through the holdings of stock might be dissipated through transfers of property by bequest,

etc., the laws against restraints of trade and monopoly can not afford to await such processes if they are to benefit the present generation.

The enforcement of this law can not injure any legitimate element of value in the properties. In so far as the eradication of this form of combination reduces investment values and profits by reestablishing competition it merely takes away an illegitimate value and an unjustifiable profit.

The inherent vice of this system of stock ownership is so plain and the legislative remedy so simple that an extended argument seems superfluous.

Those are the sections I was asked to cover, and so I will now conclude my remarks.

The CHAIRMAN. We are very much obliged to you, Mr. Thompson.

(The committee thereupon adjourned subject to the call of the chairman.)

END OF
TITLE